

RULES
FOR THE
INTERPRETATION OF DEEDS.

WITH A GLOSSARY.

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BY

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LONDON:

WILLIAM MAXWELL & SON, 8, BELL YARD, TEMPLE BAR,
Law Booksellers and Publishers.

MEREDITH, RAY, & LITTLER, MANCHESTER;
HODGES, FIGGIS, & CO., AND E. PONSONBY, DUBLIN;
CHARLES F. MAXWELL, MELBOURNE & SYDNEY.

1885.

LONDON

BRADBURY, AGNEW, & CO., PRINTERS, WHITEFRIARS.

PREFACE.

THE object of this book is to present in a moderate compass the rules for the interpretation of deeds. The only rules of law which are discussed are those which show what is the subject-matter to be interpreted, or what evidence is admissible as to the meaning of the words employed, and those which are at once rules of law and rules of construction.

A rule of construction may always be stated under the following form :—" If a given proposition, or phrase, A., may mean B., C., or D., it must be taken to mean B. when occurring in a deed of a particular nature, unless the circumstances of the parties or the context exclude that meaning."

A rule of law exists independently of the circumstances of the parties, and is paramount to any intentions that they have expressed.

Careful consideration of the reported cases will lead the reader to a conclusion for which he is, perhaps, unprepared, viz., that the law of England does not require deeds to be expressed in technical language, but that any words are proper which render the meaning clear; the only exception being that estates of inheritance could not be created in deeds before 1882 without

the word "heirs," and 'cannot be created in deeds after 1881 without the words "heirs," "fee simple," or "tail."

The question whether a judicial decision on the construction of words in a will is a safe guide to the construction of similar words occurring in a deed is one of considerable practical importance. Statements will be found in some cases (*ex. gr.* per Wood, V.-C., in *Lewis v. Rees*, 3 K. & J. at p. 147) that in construing a deed the Courts are guided by the strict legal meanings of the words, unless such meanings create a manifest contrariety or contradiction, but that a greater latitude is allowed in the construction of a will, because a testator is supposed to be *inops consilii*. If this view is, as it appears to be, correct, it would throw great difficulty in the application of cases on the construction of wills to the construction of deeds, unless perhaps where the will has manifestly been settled by a person skilled in the employment of legal language.

There is a further objection to the application of cases on wills to the construction of deeds. The reader who has fully grasped the meaning of the rule (10, *post*, p. 47) as to the employment of extrinsic evidence to determine the meanings of words, will perceive that, as the circumstances of the parties to a deed necessarily differ from those of a testator, there is no reason to suppose that words when used in a deed bear the same meanings as when used in a will. There are a few exceptional cases, as in the case of a voluntary deed, or where a testator has clearly put himself in the same

position as that of parties to a deed of a certain class. But, with these exceptions, the difference in the circumstances of the parties makes it unsafe to employ decisions on words used in a will for the determination of the meaning of similar words employed in a deed. For this reason I have, unless in the exceptional cases, founded the rules in this book on deed cases only, and have only cited will cases as illustrating the rules.

Much scattered information on the subject-matter of this book will be found in Coke's Institutes, Sheppard's Touchstone, Cruise's Digest, Bythewood's Conveyancing, and Davidson's Precedents, and the Treatises on specific parts of the law, such as those on Powers and Leases; but, owing to the absence of any systematic treatise on the subject of deeds generally, the task of collecting the cases and deducing the rules from them has been the labour of many years.

About five years ago, when I had written the rough draft of this book, I was fortunate enough to obtain the co-operation of Mr. Norton, and shortly afterwards that of Mr. Clark. With their assistance this book has been completely rewritten, with the addition of many cases that had escaped me. I venture to hope that, owing mainly to such assistance, few cases of importance have been omitted, and that no serious error likely to mislead the practitioner who refers to the cases cited will be found in the text.

At the request of several gentlemen I have added a short Glossary of some of the words occurring in deeds, with the purpose rather of indicating the authorities than

of discussing moot points. I should feel grateful to any gentleman who would give me further information as to the meanings of doubtful words.

Students are advised to master the 3rd, 4th, and 8th chapters before they read any other part of this book ; and, having regard to the difficulty of the subject-matter, to remember the words of that great lawyer Lord Mansfield, "The more we read, unless we are very careful to distinguish, the more we shall be confounded." *Taylor d. Atkyns v. Horde*, 1 Burr. 60, at p. 110 ; S.C., 2 Sm. L. C.

Owing to unavoidable causes this book has taken a long time in passing through the press, and consequently several recent cases of importance, as well as some older cases which had escaped my attention, will be found in the Addenda.

H. W. ELPHINSTONE.

LINCOLN'S INN, *July*, 1885.

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ADDENDA ET CORRIGENDA.

- Page 1, note, See *Evans v. Grey*, 9 L. R. (Ir.) 539, that an attestation clause "signed, sealed, and delivered," &c., is *prima facie* evidence of delivery, and that leaving the deed on a table "for a few seconds" is a sufficient delivery (*per* Sullivan, M. R.). As to qualifying execution by adding words, see *Exchange Bank of Yarmouth v. Blothen*, 10 App. Cas. 293.
- ib.* As to the omission of the word "signed" in the attestation clause, see *Taunton v. Pepler*, 6 Madd. 166.
- „ 2, note, line 3, *add after* "125," "*McClean v. Kennard*, L. R. 9 Ch. 336; *Griffin v. Clowes*, 20 Beav. 61. "
- ib.*, *Witham v. Vane*, *add* "S. C., 28 W. R. 276; rev. in H. L. 32 W. R. 617 (very shortly reported: see for a full report *Challis on Real Property*, Appendix, p. 341). As to a bond in form joint but executed by one obligor only, see *Underhill v. Harwood*, 10 Ves. at p. 225: and as to a bond executed by A. 'for self and B.,' without authority, see *Elliott v. Davis*, 2 Bos. & P. 338."
- „ 3, line 15: See as to prior correspondence, *Lee v. Alexander*, 8 App. Cas. 853.
- „ 3, paragraph 2: Observe that this paragraph applies only to contracts not under seal.
- „ 3, line 5 from bottom, *Leggott v. Barrett*; approved in *Palmer v. Johnson*, 13 Q. B. D. 351, at 358, 359.
- „ 4, after line 21, *add* "contract not admitted to vary parcels: *Williams v. Morgan*, 15 Q. B. 782; and Letters prior to an agreement not admitted to control it: *Hughes v. Statham*, 4 B. & C. 187."
- „ 5, after line 3, *add* "Deed not looked at to construe will: *Randall v. Daniel*, 24 Beav. 193; draft lease not looked at to construe contract: *Hayncard v. Cope*, 25 Beav. 140."
- „ 6, Apparent Exception, *add* "*Carter v. Salmon*, 43 L. T. 190 (approving *Angell v. Duke*, L. R. 10 Q. B. 174) parol collateral contract that no rent should be paid till a certain act should be done."
- „ 6, line 14, Where an intended wife refused to execute her marriage settlement till a note in writing varying the terms of the settlement was executed: *held*, that the note must be construed as part of the settlement: *Tyrrell v. Hope*, 2 Atk. 557.
- „ 6, line 25, *add* "*Ford v. Stuart*, 15 Beav. 493; *Fowler v. Hunter*, 3 Y. & J. 506."

- Page 8, Counterpart: presumption as to execution; *Witham v. Vane*, 32 W. R. 617; more fully reported in Challis on Real Property, Appendix, p. 342.
- „ 8, Rule 2, add “See *post*, p. 407, note (α), as to covenants.”
- „ 9, line 4, add “Covenant for renewal of a lease not construed according to the acts of the parties; *Iggulden v. May*, 9 Ves. 325; S. C., 7 East, 237; 2 Bos. & P. N.R. 449.”
- „ 15, line 1, for 7 read 5.
- „ 15, line 14, add “*Barrow v. Dyster*, 13 Q. B. D. 635.”
- „ 18, line 19, add “Words written after the testimonium before delivery taken as part of the deed; *Anon.* 1 Benl. & Dal. 12, pl. 12. Memorandum endorsed on deed before or at the time of execution taken as part of the deed; *Keele v. Wheeler*, 8 Scott, N. R. 323; S. C., 7 M. & Gr. 665. See also *Brewster v. Kidgell*, 12 Mod. 166; *Lyburn v. Warrington*, 1 Stark. 162.”
- „ 18, As to looking at words struck out of a printed form, see *Strickland v. Maxwell*, 2 Cr. & M. at 550.
- „ 19, after “1st Obs.,” add “*Leeds Bank v. Walker*, 11 Q. B. D. 84.”
- „ 19, at end of “2nd Obs.,” for “p. 23” read “pp. 21, 23.”
- „ 22, after “*Weeks v. Maillardet*,” add “See obs. on this case, *post*, p. 30.”
- „ 23, after “*Leech v. Leech*,” add “see *Sepalino v. Trivitt* and *Naldred v. Gillum*, cited *post*, p. 120.”
- „ 25, after “*Agric. Cattle Insee. Co. v. Fitzgerald*,” add “*Stewart v. Aston*, 8 Ir. C. L. Rep. 35.”
- „ 28, line 10, add “Where the conveying party had executed a marriage settlement and immediately before the execution by any other party an objection was taken by the father of the intended wife to a clause, which was then struck out, and thereupon the conveying party re-executed and the other parties executed, it was held, that as the deed was only *in fieri* when the alteration was made, it did not require a fresh stamp; *Jones v. Jones*, 1 Cr. & M. 721; S. C., 3 Tyrw. 890.”
- „ 28, line 21, after “as a deed,” insert “*The Société Générale de Paris v. Tramways Co. Limited*, 14 Q. B. D. 424.”
- „ 28, line 27, add “*France v. Clark*, 22 Ch. D. 830; 26 Ch. D. 257.”
- „ 29, line 11, add “See *France v. Clark*, 26 Ch. D. 257.”
- „ 33, line 10, add “Bond conditioned for payment of £100 by six equal payments of £16 13s. 4d. on the 13th of October in every year “until the full sum of one pounds” was paid. A stranger inserted the word ‘hundred’ after ‘one.’ Held, that the alteration was immaterial, as the word ‘hundred’ did not alter the sense, and therefore did not destroy the bond; *Waugh v. Russell*, 5 Taunt. 707.”
- „ 35, at end of chapter, add “It is a question of evidence whether a deed is cancelled *animo cancellandi*: per Lord Abinger, C. B., *Alsager v. Close*, 10 M. & W. 581; and see pp. 583, 584, ‘Production of a deed with the seal torn off is *prima facie* evidence of cancellation.’”

- Page 36, *Rule 8*, is also clearly enunciated by Byles, J., in *Hayne v. Cummings*, 16 C. B. N. S. 427.
- „ 41, line 27, *after* “10 M. & W. 608,” *add* “*affd.* 15 M. & W. 769; 2 H. L. C. 811.”
- „ 43, line 2, *add* “*And see Northam v. Hurley*, 1 E. & B. 665.”
- „ 43, line 21, *after* “*use*,” *insert* “*of*.”
- „ 44, line 11, *see post*, p. 408.
- „ 45, line 20, *add see* “*Walsh v. Lonsdale*, 21 Ch. D. 9; *Allhusen v. Brooking*, 26 Ch. D. 559.”
- „ 46, line 8, *after* “354 a,” *add* “*and see post*, 144.”
- „ 46, at end of chapter, *add* “*As to deeds operating as disclaimers, see Crewe v. Dicken*. 4 Ves. 97; *Nicholson v. Wordsworth*, 2 Swanst. 365; *Urch v. Walker*, 3 My. & Cr. 702; *Doe d. Wyatt v. Stagg*, 5 Bing. N. C. 564. *As to deeds operating as defeasances or releases, see Wilson v. Braddyll*, 9 Ex. 718, citing *Ailoffe v. Scrimshire*, Carth. 63; and *Lacy v. Kinaston*, 1 Ld. Raym. 688.”
- „ 47, at end of note (a), *add* “*See also per Lord Bramwell, Hill v. East and West India Dock Co.*, 9 App. Cas. 464, 465.”
- „ 47, at end of note (e), *add* “*per Bacon, V.-C., London Financial Assoc. v. Kelk*, 26 Ch. D. at p. 134; *per Cur., Behn v. Burners*, 3 B. & S. at p. 757.”
- „ 55, note (f), *add* “*cited post*, p. 95.”
- „ 56, *after* line 7, *add* “*and see per Jessel, M. R., Ex p. Walton*, 17 Ch. D. at p. 751; *per Lord Bramwell, Hill v. East and West India Dock Co.*, 9 App. Cas. at p. 464.”
- „ 56, at end of page, *add*, “*As to a will made by a domiciled Englishman in Scotch form, see Bradford v Young*, 26 Ch. D. 656, 668.”
- „ 56, last line, *add* “*Blandford v. Marlborough*, 2 Atk. at p. 545, where Law Dictionaries were referred to.”
- „ 58, at end of second paragraph, *add* “*see Boldero v. East India Co.*, 26 Beav. 316.”
- „ 61, at end, *add* “*In a contract of sale of land the term ‘freehold equities’ occurred: a document drawn up by the purchaser and given by him to the vendor but not referred to in the contract was admitted as evidence of meaning; Roots v. Snelling*, 48 L. T. 216.”
- „ 63, note, *add* “*per Pearson J., Rosher v. Rosher*, 53 L. J. Ch. 722, at 731; and *see Isherwood v. Oldknow*, 3 M. & S. at p. 397.”
- „ 65, last line, *add* “*Acro; see O'Donnell v. O'Donnell*, 1 L. R. (Ir.) 284.”
- „ 72, line 7 *after* “5 L. R. (Ir.) 555,” *add* “S. C. 9 L. R. (Ir.) 271.”
- „ 73, *after* line 16, *add* “*But evidence of usage was not admitted where there was no ambiguity: Att.-Gen. v. Mayor of Dartmouth*, 48 L. T. 939.”
- „ 74, line 8; but *see Iggulden v. May*, 9 Ves. 325; S. C. 7 East, 237; 2 Bos. & P. N. R. 449.
- „ 76, At end of Rule 16, *add* “*Shep. T.* 84, 103; and *see post*, Rule 66, p. 217; and *per Romilly, M.R., Re Strand Music Hall Co.*, 35 Beav. 159.”

- Page 78, line 20, after "disregarded" add "a parenthesis may be inserted; see post, p. 240; *Tunstall v. Trappes*, 3 Sim. at p. 312; *Re Denny*, Ir. Rep. 8 Eq. 427."
- „ 79, note (b), add "*Smith v. Oakes*, 14 Sim. 122; *Re Estate of C. Blake*, 19 W. R. 765."
- „ 81, after paragraph 2, add "Words supplied in a settlement; *Smith v. Oakes*, 14 Sim. 122."
- „ 81, note (c) add "*Bush v. Watkins*, 14 Beav. 425; *Re Strand Music Hall Co.*, 35 Beav. 153; words in a covenant rejected; *Belcher v. Sikes*, 8 B. & C. 185."
- „ 82, line 8, add "Where the condition of a bond was 'if the obligor did not pay, &c.,' the Court rejected the word 'not;' *Anon.*, cited per Buller, J., *Bache v. Proctor*, 1 Dougl. at p. 384. Covenant by B. 'that notwithstanding anything done by him it should be lawful for A. to receive certain moneys without interruption by B.;' held, that the words 'notwithstanding,' &c., were repugnant to the latter part of the covenant, and must be rejected; *Belcher v. Sikes*, 8 B. & C. 185."
- „ 85, Rule 18, see per Romilly, M.R., *Boldero v. East India Co.*, 26 Beav., at p. 342.
- „ 89, Rule 19, add "See Rule 152, post, p. 424."
- „ 90, after line 4, add "*Mather v. Fraser*, 2 K. & J. 536."
- „ 90, line 6; *Griffiths v. Penson*, is stated post, 161.
- „ 90, *Habendum*; see post, 219.
- „ 90, *Covenant*; see post, 418
- „ 90, last paragraph, see post, 424, Rule 152.
- „ 91, Rule 20; see also Rule 16, ante, p. 78, as to rejecting repugnant words.
- „ 91, line 3 from end, after "17 [Sim. 222," add "S. C. better reported 19 L. J. N. S. Ch. 445; and see *Bush v. Watkins*, 14 Beav. 425; *Re Strand Music Hall Co.*, 35 Beav. 153."
- „ 93, line 2, add "see per Romilly, M.R., *Bush v. Watkins*, 14 Beav., at p. 432."
- „ 93, Rule 21. See Rule 66, post, p. 217; per Arden, M.R., *Swann v. Fonnereau*, 3 Ves. at p. 48.
- „ 94, Deed taken more strongly against grantor: per Lord Abinger, C.B.; *Stephens v. Frost*, 2 Y. & C. Ex. 309: see post, Rule 154, p. 425.
- „ 96, line 3 from end, the reference is to 1 H. Bl.
- „ 100, note (d), add "And as to ambiguous grants, post, p. 105."
- „ 105, line 23, add "*Re Burnitt and Burland*, W. N. 1882, p. 152."
- „ 106, line 10 from end. But, on the other hand, where the grant is general, as of a manor, with an exception of a particular close by name, and there are two closes of that name, the grantor may elect which close he will retain; *Sir Thomas Lee's Case*, 1 Leon. 268.
- „ 107, line 13, add "And see *Hayward's Case*, 2 Rep. 34 b."
- „ 107, line 8 from end, for "to evidence" read "to further evidence."

- Page 112, See *Hutley v. Marshall*, 46 L. T. 186, where figures at the bottom of a note and also the stamp were looked at to explain ambiguous words in the body of the instrument.
- „ 113, Rule 27 : see *post*, pp. 129, 132.
- „ 115. At end of Rule 29, add “ And see *post*, Rule 45, p. 157.”
- „ 115, last line but one, after “ PARCELS,” add “ p. 165.”
- „ 119, As to date, see Woolrych on Legal Time.
- „ 120, line 4 from end. See also *Hope v. Harman*, 11 Jur. 1097 ; *Hall v. Palmer*, 3 Ha. 532 ; *Fletcher v. Fletcher*, 4 Ha. 67.
- „ 120, line 18 : as to disregarding fractions of a day, see *Clarke v. Bradlaugh*, 7 Q. B. D. 151. Where two deeds relating to the same subject matter are executed on the same day the Court will inquire which of them was executed first ; *Gartside v. Silkstone and Dodworth Coal and Iron Co.*, 21 Ch. D. 762.
- „ 120, Deed retained by party executing : see *Evans v. Grey*, 9 L. R. (Ir.) 539 ; *Hall v. Palmer*, 3 Hare, 532 ; S. C. 13 L. J. Ch. 352 ; Bythewood & Jarm. Conv. by Robbins, vol. ii. 264, *et seq.*
- „ 122, add, as example of escrow, “ Transfer of mortgage executed by two out of three mortgagees and money not paid : *Griffin v. Clowes*, 20 Beav. 61 ; and see *Cumberlege v. Lawson*, 1 O. B. N. S. 709 ; S. C. 26 L. J. C. P. 120.”
- „ 124, line 2, add “ *Cockell v. Gray*, 6 J. B. Moo. 483.”
- „ 125, Name of baptism : see Y. B., 9 Ed. 3, p. 14, pl. 18.
- „ 126, At end of note, add “ p. 337.”
- „ 127, line 9 from end : after “ 1 Bulst. 21,” add “ S. C. sub nom. *Eure v. Strickland*, Cro. Jac. 240.”
- „ 127, Bastard : see as to name, *Wilson v. Brockley*, 1 Phillim. Eccl. Rep. 132.
- „ 127, last line : after “ CHILDREN,” add “ Rule 132, p. 331.”
- „ 128, That a person may take any surname : see *Barlow v. Bateman*, 3 P. Wms. 65 ; *Doc d. Luscombe v. Yates*, 5 B. & Ald. 544.
- „ 131, after *Bird v. Lake*, add “ And see *post*, p. 468. But an ambiguous covenant may be explained by recitals ; *Re Michell's Trusts*, 9 Ch. D. at p. 9.”
- „ 131, Settlement : add “ *Re Webb's Trusts*, 46 L. J. Ch. 769 ; and see *post*, p. 505.”
- „ 133, line 4, add “ *Danby v. Coutts*, 29 Ch. D. 500 ; S. C. 33 W. R. 559 ; 54 L. J. Ch. 577.”
- „ 137, line 27, add “ General power to attorneys to manage property restricted by a recital of a desire to appoint the attorneys ‘ during my absence from England ;’ *Danby v. Coutts*, 29 Ch. D. 500 ; S. C. 54 L. J. Ch. 577 ; 33 W. R. 559.”
- „ 140, line 6, add “ A deed containing a misrecital of a prior instrument cannot be construed by reading that instrument : *Re Carter's Trusts*, Ir. R. 3 Eq. 495. And as to misrecitals, see *Evans v. Jones*, Kay, at pp. 37, 38.”
- „ 140, Estoppel explained : *Re Stringer*, *Shaw v. Jones-Ford*, 6 Ch. D. 1.
- „ 143, Recitals creating covenants : see *post*, pp. 415, 418.

- Page 144, Power exercised by recital. But see *Miller v. Gulson*, 13 L. R. (Ir.) 408, at p. 427.
- „ 144, line 3 from end, add "*Re Hurman and Uzbridge, &c., Ry. Co.*, 24 Ch. D. 720."
- „ 149, line 20, add "*See post*, 286, 399."
- „ last line but one, for "*to stand seised to uses*," read "*to stand seised, uses*."
- „ 151, line 5, after "*body*" insert "*of*;" and for "*the deed*," read "*a deed*."
- „ 151, line 21, add "*see per Amphlett, B., Morgan's Pat. Anchor Co. v. Morgan*, 35 L. T. N. S. 811."
- „ 151, line 22, add "*see ante*, p. 137."
- „ 152, At end of chapter, add "*See also Dart, V. & P.*; 5th ed.; 656, 730; and as to Building Societies, *Harvey v. Municipal, &c., Building Society*, 26 Ch. D. 273; *Robinson v. Trevor*, 12 Q. B. D. 423; *Sangster v. Cochrane*, 28 Ch. D. 298; *Carlisle Banking Co. v. Thompson*, *ib.* 398."
- „ 153, last line but 2: see *ante*, pp. 102, 107.
- „ 154, last line but 2, add "*See Rule 29, ante*, p. 115, and *post*, p. 167."
- „ 155, line 26, add "*see Glossary*, p. 574, s. v. FARM."
- „ 160, line 10 from end: see *post*, p. 567.
- „ 162, Inventory or schedule: see *Walsh v. Trevanton*, cited *ante*, pp. 134, 135.
- „ 165, add to the examples—Apparently, if a lessor convey the reversion by the description contained in the lease, the whole of the property comprised in the lease will pass, though, owing to changes made by the lessee, that description applies at the time when the reversion is granted to part only of the property demised; *Burton v. Browne*, Palm. 319; S. C. 2 Rol. Rep. 261, 265; Cro. Jac. 648: the reports are not easily reconcilable.
- „ 168, note, line 4, add "*Reg. v. Watson*, L. R. 3 Q. B. 762; *Rudd v. Morton*, 2 Salk. 501."
- „ 169, add to "*map*," "*A yard delineated but not coloured in a plan annexed to a conveyance, held to pass, the word 'yard' occurring among the general words: Willis v. Watney*, 30 W. R. 424; S. C. 51 L. J. Ch. 181."
- „ 169, line 5, add "*But see Dowie's Case, post*, p. 172."
- „ 170, line 9 from end, after "*1 Ex. 71*," add "*Daines v. Heath*, 3 C. B. 938; *Dampier v. Pole*, 4 Ex. 678."
- „ 173, line 2, for "*Baker*" read "*Buller*;" line 14 after "*247*" add "*cited ante*, p. 168; and see *Roe v. Lidwell*, 11 Ir. Ch. R. 320: line 30, for *M'Grath* read *Magrath*."
- „ 174, line 2, add "*And per Lord Campbell, C., Clifford v. Arundel*, 1 De G. F. & J. 311."
- „ 177, line 1, for "*p. 146*" read "*p. 176*."

- Page 178. Add "In *Goodwin v. Noble*, 8 El. & Bl. 587, a lessee who intended to purchase the freehold, by deed purported to convey it by way of mortgage, held under the circumstances, which were very special, that the leasehold interest did not pass."
- „ 178, line 20, *Francis v. Minton* is stated, *post*, p. 209.
- „ 179, line 6, *for* "passes" read "pass." ..
- „ 179, add, "*Nicol v. Beaumont*, 53 L. J. Ch. 853, citing *Reg. v. Un. K. Telegraph Co.*, 31 L. J. M. C. 66; *Reg. v. Train*, *ib.* 169."
- „ 180, line 10 from end, see *post* 584, s. v. HEDGE.
- „ 182, note, last line but one, *for* "low mark" read "low water mark." And add to note, "As to ownership of the soil of a lake see *Bloomfield v. Johnston*, Ir. R. 8 C. L. 68, at pp. 89, 899, citing *Williams v. Wilcox*, 8 A. & E. 333, and *Marshall v. Ulleswater Steam Nav. Co.*, 3 B. & S. 742."
- „ 184, line 23, add "See *ante*, p. 42, *post*, p. 408."
- „ 186, note (a), add "See *ante*, Rule 46, p. 173."
- „ 187, line 21. But see *post*, 212, 213.
- „ 189, Rule 52. *Watson v. Troughton*, 48 L. T. 508; *Glave v. Harding*, 27 L. J. Ex. 286; *Spanton v. Hines*, 3 F. & F. 52.
- „ 190, line 26, add, "See *Bayley v. G. W. Ry. Co.*, 26 Ch. D. 434."
- „ 192, after line 4, add "That the grantor has the right to choose the line of the way, see *Bolton v. Bolton*, 11 Ch. D. 968."
- „ 192, ways of convenience and cesser of way of necessity, see *Bayley v. G. W. Ry. Co.*, 26 Ch. D. 434, which seems to support *Morris v. Edgington*.
- „ 192, extent of way of necessity, see *post*, 200, 201.
- „ 192, Rule 54, See *Bayley v. G. W. Ry. Co.*, 26 Ch. D. 434.
- „ 193, line 20, See remarks on *Thomson v. Waterlow*, *post*, 197.
- „ 193, line 28, *for* "conprised" read "comprised."
- „ 193, exception, at end add "See *Glave v. Harding*, 27 L. J. Ex. 286, *per* Pollock, C. B., at 292."
- „ 197, line 3, after "without" insert "(*per* Fry, L.J., 26 Ch. D. 457)."
- „ 197, line 16. The Rule suggested by the authors seems to be supported by the case of *Bayley v. G. W. Ry. Co.*, 26 Ch. D. 434 (reported since this part of the work was in type), in which *Kay v. Oxley* and *Watts v. Kelson* were approved by the C. A.
- „ 199, line 22, *for* "easement" read "reservation."
- „ 201, line 1, "Where . . . line 7, himself," should be marked as a quotation.
- „ 201, lines 21, 22, after "way of necessity" add "reserved by a grantor."
- „ 202, before Rule 58 insert, "That the grantor has the right to select the way reserved, see *per* Fry, J., *Bolton v. Bolton*, 11 Ch. D., at p. 972."
- „ 202, Rule 58, add "see *Ewart v. Belfast Guardians*, 9 L. R. Ir. 172, on app. from 5 L. R. Ir. 536."
- „ 202, Rule 58, last line, *for* "exception" read "rule."
- „ 203, line 5, *for* "exception" read "rule."

Page 204, line 4, *add* "and the tenement at the time of the purchase and conveyance had no right of common appendant or appurtenant."

- „ 204, line 10, *add* "But the right though extinguished at law may be preserved in equity, *Styant v. Staker*, 2 Vern. 250. Where rights of common belonged to a farm, and on an enclosure of the common under 8 & 9 Vict. c. 118, the rights of common were extinguished and allotments made to the owner of the farm in respect of them : held that a subsequent lease of the farm with the usual general words did not pass the allotments, *Williams v. Phillips*, 8 Q. B. D. 437."
- „ 209, *after* line 29, *add* "See *ante*, p. 178. And by a disentailing deed only those estates tail were held to pass with which the deed professed specifically to deal, *Grattan v. Langdale*, 11 L. R. Ir. 473 (at p. 488)."
- „ 210, *Habendum*. See Challis on Real Property, Ch. xxx., pp. 333, *sqq.*
- „ 211, *after* line 7, *add* "and see as to controlling joint estate, *post*, 219."
- „ 212, 213, *Rex v. Abbess of Sion*, see *ante*, 187.
- „ 212, Rule 62. So 3 Preston, Abst. 40.
- „ 213, Rule 63. So 3 Prest. Abst. 41.
- „ 214, Rule 64. 3 Prest. Abst. 41 ; 2 Prest. Conv. 394, *sqq.* ; Burton, Comp. 442 and note ; and *qy.* as to effect of 8 & 9 Vict. c. 106, s. 5.
- „ 215, line 4, *add* "*Greenwood v. Tyler*, Hob. 314."
- „ 215, Observation, at end of, *add* "and Co. Litt. 230 b."
- „ 215, Rule 65. See Challis, R. P. 334 (2).
- „ * 216, line 9, *add* "Co. Litt. 42 a ; *post*, Ch. xxi., p. 295."
- „ 217, Rule 66. See Challis, R. P., Ch. xxx., pp. 333, 335 (4), Co. Litt. 299 a.
- „ 219, Joint estate controlled ; see *ante*, 90, 210, 211 ; Co. Litt. 183 b ; Dyer, 361 a, pl. 8.
- „ 221, line 3. See remarks on *Boddington v. Robinson* in Challis, R. P. p. 84.
- „ 221, Observation ; see Challis, R. P. 334.
- „ 224, Rule 67, line 7, *after* "heirs" *add* note. "See *post*, Ch. xxi., ESTATES FOR LIFE, pp. 295, *sqq.* ; *Barron v. Barron*, 6 Ir. Ch. R. 371, *per* Napier, C. ; *per* Holt, C. J., 1 P. Wms. 77. By special custom a customary assurance of copyholds may create an estate of inheritance without the word 'heirs.' See 2 Prest. Est. 67, citing *Bunting v. Lepingwell*, 4 Rep. at p. 29 b., Com. Dig. Copyhold, f. 8 ; Kitch. 102 b ; Watk. Copyhold, 108 ; Roll. Abr. 839, pl. 50 ; 1 Roll. Abr. 48."
- „ 225, line 3 from end, *add* "and *ante*, 114."
- „ 227, Before Seventh Exception *add* "So a trust of personalty is well created by words of reference, *Re Shirley's Trusts*, 32 Beav. 394."
- „ 228, line 14, *add* "*Cholmondeley v. Clinton*, 2 B. & Ald. 625."
- „ 228, line 21, Rule 69, note (d), *add* "and see *post*, p. 288."
- „ 229, line 4 from end, *add* reference, "*post*, 535."
- „ 232, line 23, *Bony v. Taylor* is stated, *post*, 253.
- „ 232, note f. And see Dyer, 286, b, pl. 46.
- „ 233, line 3, *add* "see *ante*, 80, 137."

Page 234, Rule 74, see *post*, Rule 84, p. 248.

„ 235, line 3, add “*Shelley v. Earsfield*, *post*, 250.”

„ 235, line 15, see *Chudleigh's Case*, 1 Rep. at 140 b ; resolution (5).

„ 236, note (h), the reference is to Chap. xxiii., p. 328.

„ 240, line 2, add “*Smy v. June*, Cro. Eliz. 219 ; S. C., *sub nom. Smy v. Chown*, 1 And. 264 ; S. C. *sub nom. Cotton's Case*, 1 Leon. 211 ; and see *Matthews v. Temple*, *post*, 280.”

„ 242, Rule 81, but “heirs of the body,” may be construed “children,” and they then take as purchasers, *post*, R. 92, p. 256.

„ 245, line 7 from end, add “see Challis on Real Property, chap. xvii., pp. 197, *sqq.*”

„ 246, line 11, add “*Re Barber's Settled Estates*, 18 Ch. D. 624.”

„ 246, line 26, add see *Manning's Case*, 8 Rep. 94b.

„ 248, Rule 84. See *ante*, Rule 74, p. 234.

„ 261, 4th Exception. See the case where the property belongs to the wife's father, discussed in Fearn, *Posth. Works*, 388, *et seq.*

„ 265, line 2, *dele* “should not.”

„ 277, line 14, add “S. C. on app., 16 Jur. 751.”

„ 278, last line. But see *Barron v. Barron*, 8 Ir. Ch. Rep. 66 ; S. C. Dru. Rep. t. Nap. 384, *contra* ; but this case seems to have been decided on the context.

„ 280, line 3 from end, *for* “1882” *read* “1883.”

„ 280, 2nd exception ; See *Knox v. Wells*, 2 H. & M. 674.

„ 281, line 11, *for* “1883” *read* “1882.”

„ 281, line 15, *Re March* is reported on App. 27 Ch. D. 166.

„ 281, line 29 ; see as to direct evidence of intention, *ante*, pp. 108, 109.

„ 282, 6th exception ; see *post*, pp. 542, 548.

„ 283, line 18, see *post*, p. 358.

„ 285, at end of chapter, add, “If a contingent remainder be limited to the heirs of two living persons, not being husband and wife, which remainder must therefore vest at different times, the respective heirs take as tenants in common : *Windham's case*, 5 Rep. at 8a. resol. 3 ; *Roe v. Quartley*, 1 T. R. 630 ; cited in Challis in R. P. p. 298.”

„ 286, note (a), add, “and as to implied interests in default of appointment, *post*, Rule 142, p. 363.”

„ 287, Rule 112, marginal note, add “*for life*.”

„ 288, observation, add “See Shep. Touch. 522, Vin. Abr. Uses, 188, *ante*, p. 149.”

„ 288, last line but three, add “see *ante*, pp. 228, 237 n.”

„ 294, Observation ; see *post*, Rule 196, p. 542.

„ 294, line 10 from bottom, see *Dennehy v. Delany*, Ir. R. 10 Eq. 377, stated *post*, p. 549.

„ 295, Rule 116, as to *habendum* cutting down the implied estate, see *ante*, p. 216 ; see as to copyholds, addenda to p. 261.

„ 298, line 15, should run “*habendum* to the wife, her executors, &c.”

„ 303, line 9, *O'Halloran v. King* is now reported 27 Ch. D. 411.

- Page 306, line 5 from end, add "*Brigg v. Brigg*, 33 W. R. 454; 54 L. J. Ch. 464."
- „ 307, line 14. Where the ultimate trust in a settlement was for the wife's "next of kin of her own blood and family in due course of administration, the same as if she had died a *feme sole*, intestate, possessed thereof or entitled thereto," and there was a covenant to settle after acquired property "on the like trusts," it was held that real estate becoming subject to the covenant passed under the ultimate trust to the heir at law of the wife; *Brigg v. Brigg*, 33 W. R. 454; S. C. 54, L. J. Ch. 464.
- „ 312, Rule 124, see *Shep. T.* 163, citing *Cranmer's Case*, Dy. 309; *Spark v. Spark*, Cro. EL 666; Bac. Abr. *Remainder* (A. 2.) p. 733.
- „ 316, line 7, for "of the fee simple" read "to the fee simple."
- „ 316, line 10; add "27 Ch. D. 394."
- „ 320, line 8, for "321" read "322."
- „ 323, note, the reference is to Rule 198, p. 549.
- „ 327, line 5 from end, the reference is to pp. 338, 339.
- „ 332, line 14, where a marriage was declared void *ab initio*, the property, of which trusts were declared by the settlement, was restored to the several donors, *Addington v. Mellor*, 33 W. R. 232.
- „ 335, Rule 135, see as to the meaning of "death unmarried, and without issue," *Heywood v. Heywood*, 29 Beav. 9.
- „ 336, at end of chapter add "See *Hardman v. Moffett*, 13 L. R. Ir. 499, where the cases were reviewed and considered."
- „ 337, eldest son, see *ante*, p. 126 n.
- „ 338, note, for "p. 349" read "pp. 353, 354."
- „ 345, line 2, for "340" read "344."
- „ 380, line 24, add "as to the rate of interest on portions, see *Balfour v. Cooper*, 23 Ch. D. 472."
- „ 387, line 16 from end, for "apellants" read "appellants."
- „ 394, line 18, for "suggested" read "suggested."
- „ 401, line 5, add "*Wakefield v. Richardson* has been affirmed in the House of Lords sub nom. *Wakefield v. Maffett*, W. N. 1885, p. 108."
- „ 405, line 6 from end, for "it" read "the Rule."
- „ 408, line 20, add "and *ante*, pp. 42, 43."
- „ 411, line 21, add "a warranty in a lease for years is a covenant, *Shep. Touch.* 163."
- „ 420, add to examples, "Paying," *Duke of Northumberland v. Errington*, 5 T. R. 522, stated *post*, pp. 478, 479."
- „ 420, line 12 from end, add "in app. 5 Ex. 713."
- „ 422, note, add "As to the liability under covenants implied in law, see *post*, p. 436."
- „ 428, Rule 159. See *Mayne on Damages*, 4th edit., p. 136, where it is said that "it is a question of law to be decided by the Judge on the construction of the whole instrument," citing *Saintier v. Ferguson*, 7 C. B. 727.
- „ 429, Rule 160, add "See *Mayne on Damages*, 4th edit., p. 145."
- „ 430, 1st marginal note, add "or liquidated damages."

- Page 433, at end of chapter, *add* "See as to penalties and liquidated damages, Mayne on Damages, 4th edit., Chap. iii. pp. 132, *et seq.*"
- „ 464, clauses introduced by participles; see also the heading, Arbitration Clauses, *ante*, p. 457.
- „ 481, for "*Sykes*" read "*Sike*."
- „ 513, line 1, for "Rule 180" read "Rule 181."
- „ 515, Rule 181. The very recent case of *Williams v. Mercier*, 10 App. Cas. 1, shows that *James v. Durant* and *Re Viant's Trusts* (stated *post*, pp. 516, 517), were correctly decided. It follows that the Rule as here stated is only true in cases where the marriage is after 1882; or, if it was before 1883, the Rule does not apply to property "which the husband shall acquire in right of the wife;" and that, on the other hand, where these words occur in settlements before 1883, they are satisfied by the interest that the husband acquires by the marriage.
- „ 517, see preceding addendum.
- „ 520, line 12 from end, *add* "But see addendum to p. 515."
- „ 529, line 6 of note after *Re Vardon's Trusts*, insert *Re Quade's Trusts*, 29 S. J. 456; S. C. W. N. 1885, p. 99.
- „ 538, Rule 193, *add* "where a recital of the articles in the settlement was the only evidence of the contents of the articles; the settlement was not controlled by the articles; *Mignau v. Parry*, 31 Beav. 211."
- „ 542, Rule 196. As to inserting cross-remainders, see *Surtees v. Surtees*, L. R. 12 Eq. 400.
- „ 558, last line *add* "or to an honour; *De Courtequay v. Lucy*, 12 Ed. III., at p. 32 (Rec. Pub.),"
- „ 570, line 2: See also the discussion of disseisin in *Taylor d. Atkyns v. Horde*, 1 Burr. 60; S. C. 2.
- „ 571, line 12, *add* "'Demesne Lands in the ordinary legal sense include all lands of whatever use or character held by the tenant in chief, and occupied by him in connection with his residence, the mansion house of the estate,' per FitzGibbon, L. J., *Griffin v. Taylor*, 16 L. R. Ir. 203. In S. C. at p. 202, per Sullivan, C. 'The true definition of demesne lands is, lands held by the owner with the mansion house.'"
- „ 575, FARTHING LAND, *add* "'Every tenement is parcell of the demaynes or servises of some manor. Commonly thirtie acres make a farthing land, nine farthings a Cornish Acre, and four Cornish Acres a Knight's fee. But this rule is overruled to a greater or lesser quantitie, according to the fruitfulness or barrennesse of the soyle. That part of the demaines which appertaineth to the Lord's dwelling house they call his Barten or Berton.' Carew's Survey of Cornwall, 1602, p. 36."
- „ 589, line 19, for "*Lutterel's*" read "*Luttrel's*."
- „ 591, line 10 from end, for "*Fish*" read "*Fisk*."
- „ 591, line 9 from end *add* "see *ante*, GROUND."
- „ 611, note, *add* reference to 13 Ed. III., 206, 208 (Rec. Pub.).
- „ 620. SOLLAR, *add* "An upper room in a house. Properly, simply a flooring; then applied to floors or stages in different parts of the house. Wedgewood, Dict. Eng. Etym."

ON THE INTERPRETATION OF DEEDS ^(a).

CHAPTER I.

EXTRINSIC EVIDENCE TO VARY DEED.

*Extrinsic evidence inadmissible to vary terms of deed :
Simultaneous deeds : Counterparts : Subsequent conduct : Custom.*

Rule 1.—No evidence of extrinsic circumstances is admissible to contradict, vary, or add to, the terms of a deed.

Deed cannot be varied by what happens before or at time of execution.

It must be remembered that this rule is not, properly speaking, a rule of interpretation ; it is a rule

(a) As to what constitutes a Deed, and as to matters connected with the execution of Deeds, see Elphinstone, *Introd. Conv.*, 3rd ed., ch. v. p. 55, and the authorities there cited ; Cruise, *Dig.* vol. 4, ohh. 1, 2 ; Pollock on *Contr.*, 3rd ed., p. 156 : *Com. Dig.* Title *Fait* ; Perkins, *Prof. Bk.*, c. 2, fol. 25a, 27d ; Dixon on *Title Deeds*, p. 468. As to execution, see *Wms. R. P.* p. 159 (14th ed.), citing *Cherry v. Heming*, 4 Ex. 631, 636 ; as to the execution of an instrument exercising a general power of appointment, see *Frene v. Clement*, 18 Ch. D. 499 ; as to attestation, Elphinstone, *Introd. Conv.* p. 57 : Dixon on *Title Deeds*, 570 ; and for a list of the instruments in which attestation is necessary, see Taylor, *Ev.* s. 1840 (7th ed.) ; as to presumption of sealing and delivery, Stephen, *Dig. Ev.* Art. 87 ; that a party to a deed cannot attest it, *Freshfield v. Reed*, 9 M. & W. 404 ; *Seal v. Claridge*, 7 Q. B. D. 516 ; as to what amounts to sealing, *re Sandilands*, L. R. 6, C. P. 411 ; as to the effect of the attestation clause, *Cabell v. Vaughan*, 1 Wms. Saund. 291 : *Portage v. Cole*,

of law limiting the subject-matter to be interpreted to that contained in the deed itself.

“ It would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by the averment of the parties to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and farmers, and all others in such cases, if such nude averments against matter in writing should be admitted ; ” *The Countess of Rutland's Case*, 5 Rep. 26a.

“ To add anything to an agreement in writing by admitting parol evidence, which would affect land, is not only contrary to the Statute of Frauds and Perjuries, but to the rule of Common Law, before the statute was in being ; ” per Lord Hardwicke, C., *Parteriche v. Powlet*, 2 Atk. 384.

“ It is not necessary to cite any case to prove the proposition that parol evidence of a parol communication between the parties ought not to be received to add a term not inserted in the specific agreement which they have executed ; and for this reason, that what passed between them in that communication may have been altered and shifted in a variety of ways, but what they have signed and sealed was finally settled. It would destroy all trust, it would destroy all security and lay it open, unless the parties are completely bound by what they have signed and sealed : ” per Lord Loughborough, C. J., *Haynes v. Hare*, 1 H. Bl. 664.

“ The rule is perfectly clear, that where a deed is in

ibid., 320 ; of execution by A. on the faith that B. will execute, *Evans v. Brombridge*, 8 De G. M. & G. 100 ; per Jessel, M.R., *Luke v. S. Kensington Hotel Co.*, 11 Ch. D. 125 ; of execution on behalf of a lunatic, *Laurie v. Lees*, 14 Ch. D. 249 ; 7 App. Ca. 19 ; deed executed by A. personating B. is forgery, and passes nothing, *Re Cooper*, 20 Ch. D. 610 ; that a party who takes the benefit of a deed is bound by it, though he does not execute it, Co. Lit. 230b ; *Re v. Houghton-le-Spring*, 2 B. & Al. 375 ; *Burnett v. Lynch*, 5 Bern. & Cres. 589 ; *Webb v. Spicer*, 13 Q. B. 886 ; consider *Witham v. Vane*, 44 L. T. Rep. N. S. 718.

writing, it will admit of no contract that is not part of the deed. Whether it adds to, or deducts from, the contract, it is impossible to introduce it on parol evidence ;” per Lord Thurlow, C., *Lord Ingham v. Child*, 1 Br. C. C. 93.

“I have never heard the general rule contradicted, that parol or extrinsic evidence cannot be admitted to contradict, vary, or add to the terms of a deed ;” per Park, J., *Smith v. Doe d. Jersey*, 2 Brod. & Bing. 541.

“By the general rules of the Common Law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract ; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreements, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract ; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted on what will be thus left of the written agreement ;” per Lord Denman, C. J., *Goss v. Lord Nugent*, 5 B. & Ad. 65 ; and Stephen, Dig. Ev. Art. 90.

“If parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging or diminishing, or modifying the contract which is to be found in the deed itself ;” per James, L.J., *Leggott v. Barrett*, 15 Ch. D. 309 ; and per Brett, L.J., p. 311.

Examples.—Evidence not admitted to show that the Bond. condition of a bond did not express the agreement between the parties ; *Buckler v. Millard*, 2 Vent. 107 ; *Mease v.*

Mease, 1 Cowp. 47; *Lainson v. Tremere*, 1 Ad. & El. 792; S. C. 3 N. & M. 603.

Settlement.

Where marriage articles provided that within six months after the marriage the husband should cause certain lands to be conveyed to him in fee so that the wife should become entitled to dower, and by the settlement executed pursuant to the articles, a jointure was given to the wife in lieu of dower, evidence was not admitted to show the reason of the change; *Brydges v. Duchess of Chandos*, 2 Ves. J. 417, 422.

Conveyance.

Where land in lease was conveyed by deed, evidence of a contemporaneous parol agreement between the parties to apportion the rents up to the time of purchase was not admitted; *Flinn v. Calow*, 1 Man. & Gr. 589.

Conditions of sale not admitted to restrict the parcels in the purchase deed; *Doe d. Norton v. Webster*, 12 Ad. & El. 442; 4 P. & D. 270. A map attached to, but not referred to in, a conveyance, not admitted to explain it; *Wyse v. Leahey*, Irish R. 9 C. L. 384. Contract for sale not admitted to import reservation into conveyance; *Teebay v. Manchester, &c., Railway Co.*, 24 Ch. D. 572.

Conveyance of "all that messuage, &c., called G. Farm, in the occupation of, &c., and containing, &c., and consisting of the several particulars specified in the schedule, and delineated on the map in the margin." Evidence not admitted to show that a slip of land not mentioned in the schedule or delineated in the plan had always been occupied as part of the farm; *Barton v. Daves*, 10 C. B. 261.

Where land was purchased by Justices, and the conveyance was made to the Clerk of the Peace in "trust for the Justices of the county of M., for the purposes of the Prison Act, 1865," evidence as to what resolutions were passed by the Justices prior to the purchase was held inadmissible to prove that the land was not purchased for the purposes of the Prison Act; *The Prison Commissioners v. The Clerk of the Peace for Middlesex*, 9 Q. B. D. 506.

Annuity deed.

Evidence of omission of a proviso for redemption of an annuity was refused, no fraud being alleged; *Portmore*

v. Morris, 2 Br. C. C. 219; *Hare v. Shearwood*, 1 Ves. J. 241; S. C. 3 Br. C. C. 168; *Haynes v. Hare*, 1 H. Bl. 659; *Lord Irnham v. Child*, 1 Br. C. C. 92.

Explanation.—Extrinsic evidence is admissible for the purpose of showing that the deed is not binding on the parties either on the ground of infancy, coverture, lunacy, fraud, mistake, accident, or duress, or on the ground of its having been made for some unlawful consideration, such as to compound a felony, or as *premium pudicitie*, or of its having been delivered as an escrow, subject to the performance of a condition which has not been fulfilled.

Evidence admissible to show that deed is not binding.

In such cases the admission of extrinsic evidence does not violate the above rule, inasmuch as it is adduced, not for the purpose of contradicting or varying the deed, but of proving that the deed ought not to be interpreted at all. See this explained by James, L.J., *Ex p. Morgan*, 2 Ch. D. 84; *Collins v. Blantern*, 2 Wils. 341, 1 Sm. L. C. 387.

The cases in which, as in *Lincoln v. Wright*, 4 De G. & J. 16, parol evidence has been admitted for the purpose of setting up part of the contract not expressed in the deed, may be explained by the Court having considered that the omission amounted to a fraud.

First Exception.—Where a deed bears no date, or an impossible or incorrect date, evidence is admissible to prove the date of the delivery; see *post*, chap. IX., “DATE.”

Second Exception.—If the consideration be stated incorrectly or not at all, or if only part of the consideration be stated, evidence is admissible to prove the true consideration; see *post*, chap. XI., “CONSIDERATION.”

Consideration.

Indorsement.

Third Exception. — Evidence is admissible whether an indorsement on a deed, purporting to vary the terms of the deed, was made before the execution of the deed: *Eales v. Conn*, 4 Sim. 65; *Lyburn v. Warrington*, 1 Stark. 162; *Thomson v. Butcher*, 3 Buls. 300, where a clause added after the testimony before delivery was held to be part of the deed.

Contract contained in several deeds.

Apparent Exception. — There is also an apparent exception, where part only of the contract between the parties is expressed in the deed, and the remaining part of the contract appears by a separate instrument, or by a collateral parol agreement (*Erskine v. Adeane*, L. R. 8 Ch. 756), which is not inconsistent with the terms of the deed.

Defeasance.

A common example of this is the case of a conveyance absolute in form, which appears by a separate defeasance, to be made only for the purpose of securing money; *Francklyn and Fern*, Barnard. Ch. Rep. 30; *Manlove v. Bale*, 2 Vern. 84.

Evidence admissible whether deeds refer to same transaction.

Evidence of the surrounding circumstances is admissible to show whether deeds, not referring to each other, are parts of the same transaction, or are separate transactions; *Lord Cromwell's Case*, 2 Rep. 69b; *Harman v. Richards*, 10 Hare, 81; *Thompson v. Webster*, 4 De G. & J. 601.

“When documents are actually contemporaneous, that is, two deeds executed at the same moment, a very common case, or within so short an interval that having regard to the nature of the transaction the Court comes to the conclusion that the series of deeds represents a single transaction between the same parties, it is then that they are treated as one deed: and of course one deed between the same parties may be read to show the meaning of a sentence, and be equally read, although not contained in one deed, but in several parchments, if all

the parchments together in the view of the Court make up one document for this purpose ;" *per* Jessel, M. R., *Smith v. Chadwick*, 20 Ch. D. 62 ; see *Re Capital, &c., Association*, 21 Ch. D. 209 ; *Anderson's Case*, 7 Ch. D. 75, where the articles of association of a company were read to explain the memorandum.

All the deeds relating to the same subject-matter, and forming part of the same transaction, whether they be executed simultaneously ; *Anon.* cited by Doddridge, J., in *Thurman v. Cooper*, 2 Roll. Rep. 23 ; and *Hopgood v. Ernest*, 3 De G. J. & S. 116 ; or after an interval, *Lord Cromwel's Case*, 2 Rep. 69b ; *Farrowes v. Farmer*, 2 Rol. Rep. 245 ; *S. C. sub. nom., Ferrers v. Fermor*, Cro. Jac. 643 ; *Harvergill v. Hare*, Cro. Jac. 510 ; *Addison v. Otway*, 2 Mod. 238 ; *Jones v. Morley*, 1 Ld. Ray, 287 (where the question is discussed how far the deed to lead the uses of a fine may be varied before the fine is levied) ; *Snape v. Turton*, Cro. Car. 472 ; *Wigson v. Garret*, 2 Lev. 149 ; *S. C., T. Raymond*, 239 ; *S. C. sub. nom., The Earl of Leicester's Case*, 1 Vent. 278 ; *Herring v. Brown*, 2 Show. 185 ; *Bolton v. Williams*, 2 Ves. Jun. 138 (where it was held that all the instruments securing an annuity form but one assurance ; so that if the memorial is defective as to one, it vitiates the whole) ; *Viner Abr. Tit. "One Entire Conveyance ;"* and *Hawkins v. Kemp*, 3 East, 410 (where the cases are discussed), must be properly construed, and have their full effect as far as possible ; and they will be presumed to have been executed in that order which will enable the intent of the parties to be carried into effect, whether they be executed simultaneously, *Taylor d. Atkins v. Horde*, 1 Burr. 106 ; 2 Sm. L. C. p. 630 ; *Gartside v. Silkstone, &c., Co.*, 21 Ch. D. 762 ; or not, *Selwyn v. Selwyn*, 2 Burr. 1131 ; *S. C.*, 1 Bl. Rep. 222, where it was held that land would pass by a will executed after the deed to lead the uses of a recovery, and before the recovery suffered.

How several deeds relating to same transaction are construed.

"Although both parts of the indenture are but as one Counterparts. deed, yet the part of the grantor is as the principal, and

the other is not but as a counterpart, . . . and if there be any difference between the parts, the counterpart shall be made to agree with the principal, and the error shall be deemed the misprision of the clerk ; " Shep. Touch. 58.

But the counterpart may be looked at for the purpose of correcting a manifest clerical error in the original ; *e.g.* where by a lease, executed by the lessor only, the property was demised for ninety-four and a quarter years, " yielding and paying therefor during the said term of ninety-one and a quarter years " a yearly rent, and the counterpart, executed by the lessee only, had ninety-one in the habendum as well as the reddendum, it was held, that there being a manifest clerical error in the lease, the counterpart might be looked at for the purpose of ascertaining what the mistake was ; *Burchell v. Clark*, 1 C. P. D. 602 ; S. C. 2 C. P. D. 88. As to memorials, see *Brown v. Armstrong*, Ir. R. 7 C. L. 130.

Memorial.

Subsequent admissions or conduct.

Rule 2.—The subsequent admission, or subsequent conduct, of a party to or person claiming under the deed as to the true meaning of the deed, cannot be received to contradict, vary, or add to, the terms of the deed.

Examples.—Where a deed purported to convey a messuage in the occupation of A. *with the appurtenances*, and it was proved that A. was in the occupation of a small adjoining garden, it was held that, the garden having passed as appurtenant to the messuage, the declarations of the grantee that he had not purchased the garden, were inadmissible to contradict the deed ; *Doe d. Norton v. Webster*, 12 A. & E. 442 ; S. C. 4 P. & D. 270.

Where a lease of a coal mine contained a covenant by the lessee to pay to the lessor a certain share of all sums of money for which the coal should sell at the pit's mouth, evidence that the lessee had accounted for and paid to the lessor the same share of money produced by the sale of coals elsewhere, was not allowed to be given in explanation of the covenant ; *Clifton v. Walmesley*, 5

T. R. 564 ; see also *Simpson v. Margelson*, 11 Q. B. 23. Voluntary settlement not controlled by subsequent letter of settlor, *Clavell v. Littleton*, Finch Pre. Ch. 305.

Exception.—Evidence of the conduct of persons living at the date of or soon after the execution of an ancient document, and acting thereunder, is admissible towards construing it ; see *post*, chap. V., “ANCIENT DOCUMENTS.” Ancient document.

Rule 3.—Evidence of custom or usage is admissible to add to the contract expressed in a deed, terms which are not inconsistent with it. Custom or usage.

This rule having reference to *implied* additional terms, must be carefully distinguished from one with which it is often confounded, the rule, namely, that extrinsic evidence may be used to show the meaning that the usage of the business to which the contract relates has affixed to words or phrases employed in setting forth the *expressed* terms of the contract (*post*, p. 57) ; see the judgment of Coleridge, J., in *Brown v. Byrne*, 3 El. & Bl. 703, *infra*. Implied additional terms.

The distinction is obvious : the rule under consideration forces us to introduce additional and unexpressed stipulations into the contract contained in the deed, while the rule referred to deals with the manner in which the meaning of the expressed terms of that contract is to be ascertained.

“It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed ; and this has been done upon the principle of presumption

that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages. Whether such a relaxation of the strictness of the common law was wisely applied, where formal instruments have been entered into, and particularly leases under seal, may well be doubted; but the contrary has been established by such authority, and the relations between landlord and tenant have been so long regulated upon the supposition that all customary obligations, not altered by the contract, are to remain in force, that it is too late to pursue a contrary course; and it would be productive of much inconvenience if this practice were now to be disturbed;" per Parke, B., *Hutton v. Warren*, 1 M. & W. 475.

"In all contracts, as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included however, as of course, by mutual understanding: evidence therefore of such incidents is receivable. The contract in truth is partly express and in writing, partly implied or understood and unwritten. But, in these cases, a restriction is established on the soundest principle, that the evidence received must not be of a particular which is repugnant to, or inconsistent with, the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence, for it is impossible to add any material incident to the written terms of a contract without altering its effect, more or less;" per Coleridge, J., *Brown v. Byrne*, 3 El. & B. 715.

"In a certain sense, every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far is inconsistent with it. If, by the side of the written contract *without*, you write the same contract *with* the added incident, the two would seem to import different obligations, and be different contracts. To take a familiar instance by way of illus-

tration : on the face of a bill of exchange at three months after date, the acceptor would be taken to bind himself to the payment precisely at the end of the three months ; but, by the custom, he is only bound to do so at the end of the days of grace, which vary according to the country in which the bill is made payable, from three up to fifteen. The truth is, that the principle on which the evidence is admissible, is that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, and which of course might vary infinitely, leaving to implication and tacit understanding, all those general and unvarying incidents which a uniform usage would annex, and according to which they must in reason be understood to contract unless they expressly exclude them. To fall within the exception therefore, of repugnancy, the incident must be such as *if expressed in the written contract*, would make it insensible or inconsistent. Thus, to warrant bacon to be 'prime singed,' adding 'that is to say, slightly tainted,' *Yates v. Pym* (6 Taunt. 446), or to insure all the boats of a ship and add, "that is to say all not slung in the quarter ;" *Blackett v. Royal Exchange Assurance Company* (2 C. & J. 244), and other cases of the same sort scattered through the books, would be instances of contracts in which both the two parts could not have full effect given to them if written down ; and therefore, when one part only is expressed, it would be unreasonable to suppose that the parties intended to include the other also ;" per Lord Campbell, C. J., *Humfrey v. Dale*, 7 El. & Bl. 274.

"The custom of trade, which is a matter of evidence, may be used to annex incidents to all written contracts, commercial or agricultural, and others, which do not by their terms exclude it, upon the presumption that the parties have contracted with reference to such usage, if it is applicable ;" per Parke, B., *Gibson v. Small*, 4 H. L. C. 397.

Examples of the rule as applied to Leases.— *Leases.*
Where the lease contained no stipulation as to the sub-

ject-matter of the custom, evidence of custom was admitted in *Wigglesworth v. Dallison*, 1 Doug. 201; S. C. 1 Sm. L. C. 8th Edit. p. 594; and *Holding v. Pigott*, 7 Bing. 465, as to the right of the tenant to enter and take way-going crops: in *Beqan v. Delahay*, (1 H. Bl. 5), as to his right to leave the way-going crop in a barn on the farm for a certain time after the expiration of the lease. Where the stipulation in the lease, though applying to the same subject-matter as the custom, was not inconsistent with it, evidence was admitted in *Hutton v. Warren* (1 M. & W. 466), as to mutual rights of both landlord and tenant in respect of the valuations at the termination of the lease.

On the other hand, the custom was excluded as being inconsistent with the lease, in *Webb v. Plummer* (2 B. & Ald. 746), where by the custom an outgoing tenant was entitled to an allowance for foldage from the incoming tenant, but the lease contained a list of payments to be made by the incoming to the outgoing tenant which did not comprise an allowance for foldage: in *Roberts v. Barker* (1 Cr. & M. 808), where the custom was that the outgoing tenant should leave the manure for the landlord and should be paid for the same, but the lease contained a stipulation that he would leave it for the landlord, and contained no provision as to payment: in *Boraston v. Green*, (16 East, 71), where the custom was that the outgoing tenant should take to his own use only two-thirds of the way-going crop, and the lease provided that he might take the whole of it, so that it did not exceed twenty-nine acres: and in *Clarke v. Royston* (13 M. & W. 752), with an agreement in writing for a yearly tenancy.

If the custom is proved it must be taken to apply, unless the terms of the written contract exclude it; *Wilkins v. Wood*, 17 L. J. N. S. Q. B. 319.

Examples of the rule as applied to Mercantile Contracts.—Although most of the following cases relate to documents not under seal, I have thought proper to insert them as illustrating the general principle.

Policy of Marine Insurance.—Where policies of Marine Policies. Insurance were in the ordinary form, evidence was admitted to prove a custom that sails taken out of a ship and warehoused while the ship was being cleaned (*Pelly v. Royal Exchange Assurance Co.*, 1 Bur. 341, 350), and that goods remaining on board the ship for a long time after arrival (*Noble v. Kennoway*, 2 Dou. 510), are covered by the policy: and that goods stowed on deck and jettisoned are not; *Miller v. Tetherington*, 7 H. & N. 954; Ex. Ch. affirming S. C. 6 H. & N. 278. On the other hand, evidence was not admitted to prove a custom that underwriters never pay for the loss of boats outside the ship, slung upon the quarter, on the ground that such evidence would have contradicted the written contract; *Blackett v. Royal Exchange Assurance Co.* 2 Cr. & J. 244; or to prove a custom that underwriters in London insuring money advanced on freight are not bound to make good a general average, where the contract was that they should pay general average; *Hall v. Janson*, 4 El. & Bl. 500.

Charter-party.—Where the engagement was to pay Charter-parties. at so much per ton for goods shipped at Bombay, cotton to be calculated at fifty cubic feet per ton, evidence was admitted of a custom to pay according to the measurement taken at Bombay before the goods are loaded; *Bottomley v. Forbes*, 5 Bing. N. C. 121. Where the defendant agreed to load a full and complete cargo of sugar at Trinidad, evidence was admitted to prove a custom at Trinidad that the sugar was to be loaded in hogsheads, and not otherwise; *Cuthbert v. Cumming*, 10 Ex. 809; 11 Ex. 405. Evidence was admitted to show that, by usage of trade, agents signing a charter-party for undisclosed principals are personally liable, if the principals are not disclosed within a reasonable time; *Hutchinson v. Tatham*, L. R. 8 C. P. 482. Where the vessel was to deliver at H., “or as near thereto as she could safely get,” “to discharge as customary,” and she could not safely get to H., evidence of a custom of the port of H., that the merchant was not bound to accept delivery otherwise

than at H., was rejected as being inconsistent with the written contract; *Hayton v. Irwin*, 5 C. P. D. 134.

Where the ship was "to be consigned to the charterer's agents in China free of commission on this charter," and a custom was alleged that whenever a ship chartered in London for China, is agreed to be consigned to the charterer's agents, whether consigned free of commission on that charter or not, it is the right and duty of such agents as the consignees of such ship, to procure a charter or cargo for the ship for any voyage from such port: and that they are entitled to be paid the usual brokers' commission on the amount of the freight payable under such charter, unless excluded by special contract: but that in case the owners of a ship procure a charter or cargo for the ship for a voyage from such port without any default of the consignees, the latter are entitled to the broker's commission on any freight payable under any such charter-party, unless such right is excluded by special contract. It was held on demurrer that the custom could not be imported into the contract, as it added a new term to it, and did not only explain particular expressions; *Phillipps v. Briard*, 1 H. & N. 21.

Bought and
sold note.

Bought and Sold Note.—Evidence was admitted of a custom that sale should be by sample; *Syers v. Jonas* 2 Ex. 111; *O'Neill v. Bell*, Ir. R. 2 C. L. 68.

Sale of "fifty tons best oil expected to arrive per *The Chalco*, at £40 per ton; wet, dirty, and inferior oil, if any, at a fair allowance." The oil arrived containing only one-fifth of "best oil." Held that usage might be proved that such a contract was satisfied if the oil delivered contained a substantial portion of best oil; *Lucas v. Bristow*, El. B. & El. 907. Evidence of usage of trade was admitted to show that where a broker purchased without disclosing the name of his principal, he was liable to be looked upon as the purchaser; *Humfrey v. Dale*, 7 E. & Bl. 266; *S. C. sub nom. Dale v. Humfrey*, El. Bl. & El. 1004; *Fleet v. Murton*, L. R. 7 Q. B. 126; and see *Imperial Bank v. London and St. Katharine*

Docks Co., 7 Ch. D. 195. See also *Bollock on Cont*, 3rd edit. p. 107 *et seq.*; *Smith's Merc. Law*, 9th edit. Bk. I. Ch. 4, p. 104.

But evidence was not admitted of the following alleged customs; viz., to insert the names of vendors' brokers in the contract when the principals were indebted to them, for the purpose only of securing that the purchase-money should pass through their hands; *Jones v. Littledale*, 6 Ad. & El. 486: to accept bacon slightly tainted as "prime singed" bacon; *Yates v. Pym*, 6 Taunt. 446; to reject undisclosed principal, and look to broker for fulfilment of contract; *Trueman v. Loder*, 11 Ad. & El. 589, (on which see 2 Sm. L. C. 408, 8th edit., and Lord Campbell's judgment in *Humphrey v. Dale*, *ubi supra*); to give credit; *Ford v. Yates*, 2 M. & G. 542: that vendors were entitled to retain goods till payment; *Spartali v. Benecke*, 10 C. B. 212 (but see *Field v. Lelean*, 30 I. J. Ex. 168; 6 II. & N. 617); the terms of the bought and sold note being in each case repugnant to the custom.

Bill of lading.—Freight to be "five-eighths of a penny Bill of lading. sterling per pound, with five per cent. primage, and average accustomed." Evidence admitted to prove that, according to usage, three months' interest is deducted from the freight on goods coming from certain ports; *Brown v. Byrne*, 3 El. & Bl. 703.

Where the master of a ship agreed to take out to certain places "a boat" of specified dimensions, he was allowed to prove a usage to take the deck off such a boat when stowed on board ship; *Haynes v. Holliday*, 7 Bing. 587.

Miscellaneous.—An architect, employed by the defen- Miscellaneous. dants to draw specifications of the plan of a new work-house, employed the plaintiff to make out the quantities; the defendants refused to allow the building to proceed: *Field*, in an action by the plaintiff for his remuneration, that he might prove a usage in the trade for architects to have the quantities taken out by surveyors; *Moon v. Whitney Union*, 3 Bing. N. C. 814.

Written contract that plaintiff should perform at defendant's theatre, and that defendant should engage her for *three years*, and pay a salary of £5, £6, and £7 per week in those years respectively: evidence was admitted to show that, according to the usage of the profession, the plaintiff was only to be paid during the theatrical season in each year: *Grant v. Maddox*, 15 M. & W. 737.

Where one of parties is ignorant of usage.

Explanation.—The rule does not apply where one of the parties is ignorant of the usage; at all events, where it is not the usage of the whole trade, but merely of some of the persons engaged in the trade. Thus, where it was found by the jury that a certain usage as to policies prevailed amongst the underwriters frequenting Lloyd's, and merchants effecting policies there, and the plaintiff effected a policy there, but it was not found that he was in the habit of frequenting the place, it was held that he was not bound by the usage; *Gabay v. Lloyd*, 3 B. & C. 798; *Robinson v. Mollett*, L. R. 7 H. L. 802; but see *Norden Steam Co. v. Dempsey*, 1 C. P. D. 654. See further on this subject, *Johnson v. Raylton*, 7 Q. B. D. 438; notes to *Wigglesworth v. Dallison*, 1 Sm. L. C. 8th edit. p. 594; Leake on Contracts, Pt. I. Ch. 41, sec. 2, p. 176; Chitty on Contracts, 11th edit. p. 108 *et seq.*; Woodfall, Landl. & Tent. 12th edit. 724 *et seq.*; Smith, Landl. & Tent. 3rd edit. p. 307; Steph. Dig. Ev. Art. 90; Taylor on Evidence, 7th edit. sec. 1168 *et seq.*

CHAPTER II.

ALTERATIONS.

Presumption as to time of alterations : Deeds partly in print and partly in writing : Pencil alterations : Material alterations by party : What is a material alteration : Altered deed evidence of rights resulting from its execution : Alterations with consent of all parties : Blanks filled up : Transfers in blank : Cancellation of seal of one party : Alterations made by a stranger : Immaterial alterations : Fraudulent alterations : Alterations made by mistake or accident.

Rule 4.—Alterations and interlineations in a deed are presumed, in the absence of evidence to the contrary, to have been made prior to execution.

Alterations in deed presumed to be made before execution.

In Co. Litt. 225 b (citing *Dr. Leyfield's Case*, 10 Rep. 92 b), it is said: "Of ancient time if the deed appeared to be rased or interlined in places material, the judges adjudged upon their view the deed to be void. But of latter time, the judges have left that to the jurors to try whether the rasing or interlining were before the delivery."

In the note on this passage in Butler & Hargrave's edition, it is said: "It is to be presumed that an interlining, if the contrary is not proved, was made at the time of making the deed;" citing *Trouel v. Castle*, 1 Keb. 21.

In *Doe d. Tatum v. Catomore*, 16 Q. B. 746, Lord Campbell, C.J., after citing the passage just quoted,

says: "This doctrine seems to us to rest upon principle. A deed cannot be altered, after it is executed, without fraud or wrong; and the presumption is against fraud or wrong." See also to the same effect, per Wood, V.-C., *Williams v. Ashton*, 1 J. & H. 118.

"In the case of deeds, the authorities seem to show that, when there are interlineations, the presumption is that they were made before execution. . . . And this is consistent with good sense; for every deed expresses the mind of the parties at the time of its execution; and so, to alter it afterwards, would be fraudulent, and in many cases highly criminal;" per Lord Cranworth, V.-C., *Simmons v. Rudall*, 1 Sim. N. S., at p. 186.

"There is no proof when these words were interlined, or that they were inserted by the direction of the settlor; therefore I must look upon them as if they had been originally incorporated in the body of the deed;" per Reynolds, C.B., *Fitzgerald v. Fauconberge*, Fitzgibbons, Rep. 214.

Observation.—It is worth observing that if a deed of a common nature be in print with alterations in writing, the written words are entitled, if there be any reasonable doubt upon the meaning of the whole, to have greater effect than the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, while the printed words are a general formula, adapted equally to their case and that of all other contracting parties upon similar occasions and subjects; *Robertson v. French*, 4 East, 190.

"It has been held that the general presumption and probability are, that where alterations (in a will) in pencil only are made, they are deliberative; where in ink they are final and absolute;" Wms. Exec. Pt. I. Bk. II. s. 5. I have been unable to find any authority as to the effect of pencil alterations in deeds, but they would probably be disregarded, whether made before or after execution.

Printed deed
altered in
writing.

Pencil
alterations.

Rule 5.—If a material alteration be made in a deed by or with the consent of any party to it after execution, by rasure, interlineation, or otherwise, he cannot afterwards as plaintiff enforce any obligation for his benefit contained in it.

Material alteration made by party after execution.

1st Explanatory Observation.—An alteration which, if made before execution, would have affected the rights or obligations of any person claiming under the deed, is material : possibly other alterations may be material ; *Master v. Miller*, 4 T.R. 320 ; 2 H. Bl. 141 ; 1 Sm. L. C. See the authorities collected in *Caldwell v. Parker*, 3 Ir. Rep. Eq. 519 ; *Suffell v. Bank of England*, 7 Q. B. D. 270 ; 9 Q. B. D. 555 ; Taylor, Ev. 7th ed. s. 1819 *et seq.*

Material alteration defined.

2nd Explanatory Observation.—There is a distinction between those deeds, or clauses of a deed, which have a continuing effect or are executory, such as a covenant to pay a sum of money, and those which produce their full effect at the instant of execution, such as a conveyance of land. No case can be found in which a deed or clause of the latter nature has been prevented from taking effect because the deed was altered after execution : so that an altered deed may be given in evidence to prove any effect produced by it at the instant of execution, or of any right which existed aliunde, and of which it is evidence. See *post*, p. 23.

Cases in which a deed materially altered may be given in evidence by plaintiff.

3rd Explanatory Observation.—A deed which has been materially altered by a defendant may be given in evidence by him. See *Pattinson v. Luckley*, L. R. 10 Ex. 330 (a case of an instrument not under seal), and the cases there cited.

A defendant may give altered deed in evidence.

Rule as formerly stated

The rule is sometimes, and particularly in the older cases, stated as follows: "A material alteration in a deed made after execution renders it void." The rule as thus stated must be qualified by the foregoing explanatory observations. It is probable that the reason of the rule being stated in this form was, that when an altered deed was declared upon by a plaintiff, the proper plea for a defendant who defended the action on the ground of the deed being altered was "*non est factum*."

"If a deed that is well and sufficiently made in its creation, shall be afterwards altered . . . in any material place . . . be the same either by the party himself that hath the property of the deed, or any other (a) whomsoever, except it be by him that is bound by the deed, or by his order or consent, for he shall not take advantage of his own wrong, and be the same with or without the consent of him to whom it is made or doth belong; in this case, and by either of these means, the deed is become void . . . But if the alteration be made by the party himself that is bound by the deed in any material or immaterial part thereof, or if a stranger without the privity or consent of the owner of the deed shall make any such alteration in any part of a deed not material, hereby the deed is not hurt, but it remaineth good notwithstanding."—Shepp. Touch. 68.

"When any deed is altered in a point material, by the plaintiff himself or by any stranger without the privity of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line, or through the midst of any material word, the deed thereby becomes void;" *Pigot's Case*, 11 Rep. 26 b; S. C. 2 Buls. 246.

"That the alteration in this instrument (a bill of exchange) would have avoided it, if it had been a deed, no person can doubt. And why, in point of policy, would it have had that effect in a deed? Because no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event, when it

(a) As to alterations by a stranger, see *post*, p. 31.

is detected ;" per Kenyon, C.J., in *Master v. Miller*, 4 T. R. 329 ; S. C. 2 H. Bl. 140 ; 1 Sm. L. C. (8th ed.) 857.

"The strictness of the rule on this subject, as laid down in *Pigot's Case*, can only be explained on the principle that a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration, except through fraud or laches on his part ;" per Lord Denman, C.J., *Davidson v. Cooper*, 13 M. & W. 352, on app. from 11 M. & W. 778 ; S. C. 13 L. J. Exch. 276.

"Where a thing lies in livery, a deed formerly sealed may be given in evidence relating to it, though the seal be afterwards torn off ; for the interest passed by the act of livery that invests the party with the possession, and the possession that was once transferred by the deed doth not return back again, though the deed was cancelled ; . . . so, if the conveyance was made by lease and re-lease, the uses were once executed by the statute, and they do not return back again by cancelling of the deed ;" Gilbert on Evid. (6th ed.) p. 95.

Examples, where after alterations made by or with the consent of the person setting up the deed, he was unable to enforce the obligations contained in it. Examples of alterations by plaintiff.

—The condition of a bond which is erased is not good ; Bond.
Bro. Ab. Facts (pl. 7) ; see pl. 9 & 11. Where a man was bound in a single obligation, and the obligee added a condition ; *held*, that the obligee could not enforce the obligation, though the alteration was to the advantage of the obligor ; Keilw. 162, pl. 2 ; 164, pl. 7. See *post*, p. 62.

Policy of Insurance "on ship and outfit" altered by the consent of all parties to "ship and goods ;" *French v. Patton*, 9 East, 351 ; altered by the assured without the consent of the underwriters as to the time of sailing ; *Fairlie v. Christie*, 7 Taunt. 416 ; as to places to be Policy.

called at, *Forsikaw v. Chabert*, 3 Brod. & B. 158; *held*, in each case that the assured could not recover on the policy. Policy of insurance on a ship executed in printed form, without any specific subject of insurance, and the subject-matter afterwards added in writing; *held*, that the assured could not recover against underwriters who had not signed the addition; *Langhorn v. Cologan*, 4 Taunt. 330; see also *Sanderson v. McCullom*, 4 J. B. Moore, 5; S. C., sub nom. *Sanderson v. Symonds*, 1 Brod. & B. 426; where the addition was held immaterial; and see, as to alterations in policies, 30 & 31 Vict. c. 23, s. 10.

Charter-party. Alteration made in a charter-party by the broker, who acted for plaintiff, by adding after the words "to sail on or after the 15th day of March next," the words "wind and weather permitting;" *held*, that the plaintiff could not enforce the charter-party; *Croockewit v. Fletcher*, 1 H. & N. 893.

Covenant. M. covenants to deliver to W. by a certain day "the whole of his mechanical pieces as per schedule annexed;" the schedule was annexed by the agent to both parties after the execution of the deed; *held*, on an action for non-delivery of the articles, that the schedule was a material part of the deed, which was not intelligible without it, and accordingly the defendant succeeded on a plea of *non est factum*; *Weeks v. Maillardet*, 14 East, 568.

Creditors' deed. A deed, registered under s. 192 of the Bankruptcy Act, 1861, was expressed to be made between the debtor, a surety, and scheduled creditors; at the time of execution no schedule was affixed, but one was afterwards added by the debtor; *held*, that he could not afterwards set up the deed; *Sellin v. Price*, L. R. 2 Ex. 189.

Release. Action on a Bill of Exchange accepted by the defendant; defendant pleaded a release by deed: it appeared that when the plaintiff executed the deed, which was a creditors' deed, there was a blank opposite his name in the schedule of debts, which was afterwards incorrectly filled up by the defendant: the plaintiff replied *non est*

factum, and succeeded; *Fazakerly v. McKnight*, 6 El. & Bl. 795.

The rule is applied to instruments not under seal : Rule applied to instruments not under seal.

Assumpsit brought on a guarantee in writing; plea, that while the guarantee was in plaintiff's hands, it was, without the defendant's consent or knowledge, materially altered by the addition of two seals opposite the names of the plaintiff and defendant; *held*, that the defendant was entitled to judgment; *Davidson v. Cooper*, 11 M. & W. 778; on appeal, 13 M. & W. 343.

The rule has been applied to alterations in a sale note: *Powell v. Directt*, 15 East, 29; in a bill of exchange: *Master v. Miller*, 4 T. R. 320; on appeal, 2 H. Bl. 140; S. C. 1 Sm. L. C. (8th ed.), p. 857; *Knill v. Williams*, 10 East, 431; *Cowie v. Halsall*, 4 B. & Ald. 197; *Tidmarsh v. Grover*, 1 M. & S. 735; *Burchfield v. Moore*, 3 El. & Bl. 683; in a note of the Bank of England, *Suffell v. Bank of England*, 7 Q. B. D. 270; 9 Q. B. D. 555; *Leeds, &c., Bank v. Walker*, 11 Q. B. D. 84 (a).

In most of the cases cited above, the instrument was declared to be void; but see *ante*, p. 20.

Examples where an altered deed was admitted in evidence to prove an effect produced by it at the instant of execution, or a right existing aliunde.—Examples where altered deed was admitted in evidence to prove effect produced at instant of execution.
In *Woodward v. Aston*, 1 Vent. 296, the Court said that a rent or other grant was not lost by the destruction of the deed, as a bond or chose in action was. The reporter adds, "*Quære*, if the party himself cancel it."

A. made an additional jointure to his wife by voluntary conveyance, which he kept in his own power, and he afterwards cancelled the deed. The wife after his death found the deed, and recovered by virtue of it; *Lady Hudson's Case*, cited by Wright, L. K., 2 Vern. 475; Ch. Prec. 235.

Decreed that, though a trust deed was cancelled, yet it should not divest the estate of the trustees therein named; *Leech v. Leech*, 2 Rep. Ch. 100.

(a) See as to alterations in bills of exchange, 45 & 46 Vict. c. 61, ss. 63, 64.

Assignment by Commissioners of Bankrupts to plaintiffs and S. Afterwards, the assignment was cancelled, and another was made to the plaintiffs only. *Held*, that the cancelling of the first assignment did not alter the property, which remained in all three; *Nelthorpe & Farrington v. Dorrington*, 2 Lev. 113.

The cancelling of a deed does not re-vest the property conveyed; per Holroyd, J., *Doe d. Lewis v. Bingham*, 4 B. & Ald. 677.

In the important case of *Davidson v. Cooper*, 11 M. & W. 778, Lord Abinger, C.B., in delivering the judgment of the Court, says: "The moment after their execution, the deeds [*sc.* of conveyance] become valueless, so far as they relate to the passing of the estate, except as affording evidence of the fact that they were executed. If the effect of the execution of such deeds was to create a title to the land in question, that title cannot be affected by the subsequent alteration of the deeds; and the principles laid down in *Pigot's Case* would not be applicable. But if the party is not proceeding by ejectment to recover the land conveyed, but is suing the grantor under his covenants for title, or other covenants contained in the release, there the alteration of the deed in any material point, after its execution, whether made by the party or by a stranger (*a*), would certainly defeat the right of the party suing to recover."

"I hold clearly that the cancelling a deed will not divest property which has once vested by transmutation of possession; and I would go farther, and say that the law is the same with respect to things that lie in grant;" per Eyre, C.J., *Bolton v. Bishop of Carlisle*, 2 H. B. 263.

An assignment by A. of all his personal property and effects to trustees for the benefit of creditors, was held to have passed the property to the trustees, though the deed purported to have as parties the scheduled creditors of A., and the schedule was added after the execution

(a) See as to alterations by a stranger, *post*, p. 31.

by A. ; *West v. Steward*, 14 M. & W. 47 ; distinguishing *Weeks v. Maillardet*, 14 East, 568 ; *ante*, p. 22.

“ There is no ground for saying that, if a deed be altered in a material part, it is rendered void from the beginning. It ceases to have any new operation, and no action can be brought in respect of any pending obligation which would have arisen from it had it remained entire ; but it may still be given in evidence to prove a right or title created by its having been executed, or to prove any collateral fact ;” per Lord Campbell, C.J., *Agricultural Cattle Insurance Co. v. Fitzgerald*, 16 Q. B. 440 ; and see, per Lord Abinger, C.B., *Hutchins v. Scott*, 2 M. & W. 815, 816 ; and the American case of *Lewis v. Payne*, 8 Cowen, 71.

The mere cancelling of a lease does not, since the Statute of Frauds, operate as a surrender so as to destroy the estate vested in the lessee : *Magennis v. McCulloch*, Gilb. Eq. Rep. 235 ; *Roe d. Berkeley v. Abp. of York*, 6 East, 86 : nor to defeat the right of the lessor to recover rent in an action on the demise ; for, the rent being incident to the reversion, such an action lay for the reversioner at common law, and is founded, not on the deed, but on the fact of the demise, of which the deed is evidence ; *Lord Ward v. Lumley*, 5 H. & N. 87. See also as to the old doctrine, *Miller v. Mainwaring*, Cro. Car. 397 ; *Anon.*, Moore, p. 35, pl. 116.

Where a settlement was gained under an indenture of apprenticeship, and afterwards the deed was materially altered, it was admitted as evidence to show a settlement gained prior to the alteration ; *Littleham v. St. Leonards*, cited Co. Rep. by Fraser, Vol. VI. p. 48, note B.

Examples where the alterations are made with the consent of all parties.—Here a distinction must be drawn between cases where the effect of the alteration is to substitute a new contract for the original contract, and cases where the

Alterations made with the consent of all parties.
To prove a right existing *aliunde*.

alteration is made for the purpose of correcting a common mistake, or carrying out the original intention. In the former cases, the deed as executed expressed the intention of the parties at the time of execution, and accordingly the alteration falls within the rule, and vitiates the deed; *French v. Patton*, 9 East, 351: but in the latter case, the deed as executed did not express that intention; the alteration is necessary for the purpose of expressing that intention correctly, and the deed as altered is binding: *Bates v. Grabham*, Salk. 444; *Cole v. Parkin*, 12 East, 471.

Blanks filled
up.

On the same principle, the mere filling up of blanks after execution with the consent of all parties, does not, while filling them without such consent, does, vitiate the deed. See Pigott on Recoveries, p. 213.

A comparison of the reports of the two actions of *Markham v. Fox*, as cited in *Markham v. Gonaston*, Cro. El. 626, and Moore, 547, brings out the distinction very clearly. In the case reported in Croke, Markham brought an action on a bond against Fox, who successfully defended it on the plea that blanks, namely, the Christian name and place of habitation of a person mentioned in the condition, had been filled up after execution, and therefore that it was not his deed. In the report in Moore, it appears that in a subsequent action on the same bond, the plaintiff alleged that the blanks had been filled up *with the consent* of the defendant, and succeeded on demurrer. See the reporter's note in *French v. Patton*, 9 East, at p. 354.

The deed was held valid in the following cases: Where a person nominated by deed as attorney filled up a blank left for his Christian name: *Eagleton v. Gutteridge*, 11 M. & W. 465; where a blank left for the date was filled up with a date which the Court assumed to be

the true date, and to be an immaterial alteration : *Keane v. Smallbone*, 17 C. B. 179 ; a conveyance made by A. of his property to trustees for the benefit of his creditors, the particulars of whose demands were stated in the deed, but a blank was left for one of the principal debts, the exact amount of which, being subsequently ascertained, was inserted in the deed in A.'s presence and with his assent, was supported on the ground that either it was not a deed till the blank was filled up, and that the filling up of the blank in the presence of A. was equivalent to execution by him, or that it was originally a deed intended to take effect as soon as the blanks were filled up : *Hudson v. Revett*, 5 Bing. 368 ; S. C. 2 Moo. & P. 663. Where a mortgage was executed with blanks for the names of the tenants, the date of the deed, and the date of the redemption, all of which were subsequently filled in, it was held that, these being merely formal alterations, and made only for the purpose of completing the expression of the intention of the parties to the deed, already apparent on the face of it, the deed as completed was good : *Adsetts v. Hives*, 33 Beav. 52.

On the other hand, in an action on a bill of exchange, defendant pleaded a release by deed, and the plaintiff replied *non est factum* ; the deed recited that the defendant was indebted to certain parties thereto in the sums set opposite their names ; and in consideration of a guarantee of ten shillings in the pound by a third party, the creditors parties thereto released their debts ; a blank which was opposite the name of the plaintiff was filled up with a wrong amount without his authority, and the plaintiff succeeded on the plea of *non est factum* ; *Fazakerly v. McKnight*, 6 El. & B. 795.

As to presuming, if necessary, a fresh execution of the deed after the alterations have been made, or the blanks filled up, see *Cole v. Parkin*, 12 East, 47 ; *Hudson v. Revett*, *supra* ; 5 Bing. 368 ; S. C. 2 Moo. & P. 663 ; and as to the necessity for a new stamp, see *Cole v. Parkin*, 12 East, 47.

Presumption
of fresh execu-
tion.

Reference may also be made to *Doe d. Lewis v. Bing*- Alterations

after execution *ham*, 4 B. & Al. 672; *Hall v. Chandless*, 12 Moore, 316;
 by some parties. S. C. 4 Bing. 128; where blanks were filled up and alterations made after some only of the parties had executed without their consent, and being immaterial as regards them, were held not to vitiate the deed. It appears that the insertion with the consent of all parties of the name of an additional obligor to a bond after execution does not vitiate it; *Zouch v. Clay*, 2 Lev. 35; on the ground, apparently, that it operates as a new deed; S. C. 2 Keb. 872.

Transfers in
 blank.

Transfers in blank.—It must be observed that in cases already treated of, where the blanks are filled up with consent of all parties, the object is to carry out the contract previously made between the parties; but, on the other hand, where an instrument is executed in the form of a deed, not in pursuance of any previous contract, but with the intention of getting some person to enter into a contract which can be expressed by filling his name into the blanks of the instrument, the instrument, notwithstanding that the blanks may be filled up, is void *as a deed*, although it may possibly have the effect of showing what was intended to be the contract subsequently entered into between the parties: *Re Barned's Banking Co.*, L. R. 3 Ch. 105; and, if a deed is not necessary, may take effect as an instrument in writing: *Re Tahiti Cotton Co., Ex parte Sargent*, L. R. 17 Eq. 278.

It is said in Lindley on Partnership, 4th ed., p. 705: "Whatever may be the legal method of transferring shares, and whether a formal deed is or is not requisite, it is a common practice in the share market for a seller of shares to sign a deed or instrument of transfer with the name of the transferee in blank. The buyer then inserts his own name, or without doing so resells, and hands the blank transfer to the new purchaser, who again either inserts his own name as the transferee, or resells and delivers the transfer, still in blank, to the purchaser from him, and so on. . . . A deed executed by A., and purporting to transfer the property to ———, *i.e.*, to

nobody, is altogether inoperative as a deed ; and consequently, if a shareholder in a company, the shares in which are transferable by deed only, executes a transfer of his shares in blank, he still remains legal owner of the shares, and the holders of the deed acquire no other title to the shares than a right to have them properly transferred, or to have the transferor declared a trustee for them." See *Hibblewhite v. M'Morine*, 6 M. & W. 200 ; S. C. 4 Jur. 769 (which overruled *Texeira v. Evans*, 1 Anstr. 228) ; *Shep. Touch.* 68 ; *Humble v. Langston*, 7 M. & W. 517.

The instrument in blank does not at law transfer the ownership of the shares to which it relates, even as between the vendor and the purchaser ; nor does the purchaser, by taking such a transfer, contract any obligation at law to procure himself or any one else to be registered as a shareholder, or to indemnify the seller from the consequences of his continuing to be a shareholder as between himself and the company. A deed of transfer with a blank for the name of the transferee, is, as a deed, as invalid in equity as at law ; and the shares comprised in it remain in equity as at law the property of the transferor. See also *Taylor v. Great Indian Peninsula Rail. Co.*, 4 De G. & J. 559 ; and *Ex parte Swan*, 7 C. B. N. S. 400 ; *Swan v. North British Australasian Co., Limited*, 7 H. & N. 603 ; 2 H. & C. 175 ; where the names of the transferees and the description of the shares were fraudulently added after the execution of a transfer in blank by the shareholders.

Where the names of both vendor and purchaser are inserted in the transfer, and the description of the subject-matter is merely amplified after execution, but a contract complete in its essential terms is entered into before execution, the blank being left only because the parties are ignorant of the full description of the property, the deed as filled up is binding ; but, on the other hand, if no complete contract be made before execution, and the description is wholly wanting, so that the deed passes nothing, the subsequent filling up of a blank by

supplying the whole description will not enable it to do so ; so that the distinction seems to be between filling up an immaterial blank, and supplying a description which would be wholly wanting but for the additions made. But *semble*, even such an instrument might be supported in equity ; see per Lord Cairns, L.J., *In re Barned's Banking Co.*, L. R. 8 Ch. 105, 115.

The case of *Weeks v. Maillardet*, 14 East, 569 (*supra*, p. 22), is not at variance with this rule, because in that case the plaintiff sued on the deed with the schedule, and therefore the Court could not but give judgment in favour of the defendant's plea, *non est factum* ; but it by no means follows that the plaintiff would not have succeeded if he had sued on the deed without the schedule ; for the schedule was only an enumeration of property, which was perfectly ascertained by the deed without the schedule—that is, the schedule was an immaterial addition.

Cancellation of
seal of one
party.

Exception.—The cancellation of the seal of one party to a deed, where the parties are severally bound, does not vitiate the deed as to the other parties ; but it is otherwise if they be jointly bound.

Examples.—Where, in a charter-party indented, the covenants on the part of the master and owners of a ship with the merchants were joint, and the covenants on the part of the merchants were several, it was resolved that if the seal of one of the merchants was broken from the deed, it did not avoid the deed, but only against him ; but if any of the seals of the master or owners had been broken from the deed, all their covenants would have been defeated. When the covenants are several, they are as several deeds written on the same piece of parchment ; *Mathewson's Case*, 5 Rep. 22 b ; S. C., *sub. nom. Mathewson v. Lydiate*, Cro. Eliz. 408, 470, 546.

Where a bond was several, the cancellation by the

obligees of the seal of one obligor rendered it void as to him alone: *Collins v. Prosser*, 1 B. & C. 682; S. C. 3 Dow. & Ry. 112. But where the bond was joint and several, the cancellation of the seal of one obligor was held to render it void as to all; *Seaton v. Henson*, 2 Show. K. B. Rep. (Leach's ed.) 29; S. C. 2 Lev. 220.

Material alterations made by a stranger.—Material alterations by a stranger.

There is considerable difference of opinion as to the effect of a material alteration made by a stranger, *i.e.*, a person who is not a party to the deed.

On the one hand, according to *Davidson v. Cooper*, 11 M. & W. 778; S. C. 13 M. & W. 343; *The Bank of Hindostan v. Smith*, 36 L. J. N. S., C. P., 241; Taylor on Evidence, s. 1829 (7th ed.), the rule should be extended to material alterations made by a stranger; and Stephen, J., considers that the rule extends to alterations made by a stranger, with the qualification that the alterations must have been made while the deed was in the custody or possession or under the control of the party seeking to enforce it; but he disapproves of such extension: Dig. Ev. Pref. (3rd ed.), p. xxxvi. He gives the rule thus (Steph. Dig. Ev. Art. 89):—"No person producing any document, which upon its face appears to have been altered in a material part, can claim under it the enforcement of any right created by it, unless the alteration was made before the completion of the document, or with the consent of the party to be charged under it, or his representative in interest. . . . ~~The~~ rule extends to cases in which the alteration was made by a stranger, whilst the document was in the custody of the person producing it, but without his knowledge or leave."

On the other hand, Lord St. Leonards (Sugd. Pow. 603, 8th ed.) considers that alterations made by a stranger do not vitiate the deed; saying that the true ground of the rule is the fraud of the party interested; and he cites *Henfree v. Bromley*, 6 East, 810, which was

a case of the alteration, not of a deed, but of an award by the umpire after his authority had expired; and in which Lord Ellenborough, C.J., said: "The alteration made by him [the umpire] afterwards was no more than a mere spoliation by a stranger, which would not vacate the award I can no more consider this as avoiding the instrument than if it had been obliterated or cancelled by accident."

"It is difficult to understand why an alteration by a stranger should in any case avoid the deed—why the tortious act of a third person should affect the rights of the parties to it—unless the alteration goes the length of making it doubtful what the deed originally was, and what the parties meant;" *Hutchins v. Scott*, 2 M. & W. 809, per Alderson, B., at p. 814.

It may be added that in America it has been held that the act of a stranger will not vitiate a deed; *Rees v. Overbaugh*, 6 Cowen, 746; see *Lewis v. Payn*, 8 Cowen, at p. 73.

Immaterial
alterations.

Rule 6.—An immaterial alteration made in a deed after execution does not vitiate it, by whomsoever such alteration is made.

Observation.—An alteration is considered immaterial where it only expresses something which would have been implied as the deed stood before the alteration; *Sanderson v. Symonds*, 1 Brod. & B. 426; and see the cases collected in *Aldous v. Cornwell*, L. R. 3 Q. B. 573; S. C. 9 B. & S. 607.

Examples.—An alteration made by the covenantee for the benefit of the covenantor held to be immaterial: *Darcy & Sharpe's Case*, 1 Leon. 282; but see *Keilw.* 162, pl. 2; 164, pl. 7.

A deed under s. 192 of the Bankruptcy Act, 1861, was expressed to be made between the debtor and certain

persons named in the schedule as creditors, and all other the creditors of the debtor, and was executed by a majority in number, representing three-fourths in value of his creditors, and was then registered; after registration, the names of two additional creditors were added to the schedule:—*Held*, that the alteration was not material, and that, as before registration the necessary number of creditors had executed, the insertion of the names of the two creditors did not affect the validity of the deed; *Wood v. Slack*, L. R. 3 Q. B. 379.

After a deed had been executed, one of the parties drew his pen through his own and another party's signatures; it was admitted that the erasure was made wilfully, and under the impression that it might influence claims to be made *dehors* the deed, but no fraud was intended; the deed contained no grant or covenant by the parties whose signatures were thus erased, and imposed no liability on them; they were simply covenantees. It was held that the erasure was immaterial, and did not avoid the deed; *Caldwell v. Parker*, Ir. R. 3 Eq. 519; disapproved of in *Suffell v. Bank of England*, 9 Q. B. D. 555.

As to filling up of blanks after execution, see *ante*, p. 26 *et seq.*

Observation.—It was formerly held that even an immaterial alteration made by or with the consent of the person for whose benefit it was intended, would render an instrument void; *Pigot's Case*, 11 Rep. 26 b; S. C., 2 Bulstr. 246; *Shep. Touch.* 68, 69: but this is no longer law; *Aldous v. Cornwell*, L. R. 3 Q. B. 573; S. C. 9 B. & S. 607; 37 L. J. Q. B. 201.

Fraudulent alterations.—"If the alteration be fraudulently made by the party claiming under the instrument, it does not seem important whether it

Old law as to
immaterial
alterations.

Fraudulent
alterations.

be in a material or an immaterial part; for, in either case, he has brought himself under the operation of the rule established for the prevention of malpractices; and having fraudulently destroyed the identity of the instrument, he must incur the peril of all the consequences:” Taylor, Ev. s. 1830 (7th ed.), citing *Sanderson v. Symonds*, 1 Brod. & B. 426; the American case of *Adams v. Frye*, 3 Metc. 103; and other cases.

Alteration by
accident or
mistake.

Rule 7.—An alteration or cancellation made in a deed by accident or mistake does not affect it.

This was not formerly law; Shep. Touch. 69.

Examples.—Where the seals were eaten by rats and mice: *Bayly v. Garford*, March, 125; where the seal was pulled off by a little boy: *Anon.*, Latch, 226; S. C., Palmer, 403; the deeds were allowed to be given in evidence.

“If the absence of intention to cancel be shown, the thing is not cancelled;” per Maule, J., *Bamberger v. The Commercial Credit*, 15 C. B. 698; *Perrott v. Perrott*, 14 East, 428.

“I can no more consider this as avoiding the instrument than if it had been obliterated or cancelled by accident;” per Lord Ellenborough, C.J., *Henfree v. Bromley*, 6 East, 809.

Mr. Taylor (Ev. s. 1828, 7th ed.) seems to consider that a deed would still be vitiated even by an accidental alteration, or one made by mistake, provided in either case the deed, when so altered, was in the custody of the party seeking to enforce it: he cites *Davidson v. Cooper*, 11 M. & W. 778; 18 M. & W. 843; but see *Nichols v. Haywood*, Dyer, 59, and *Master v. Miller*, 4 T. R., at p. 339, where Buller, J., says: “It is not universally true that a deed is destroyed by an alteration, or by tearing off the seal. . . . In any case where the seal is

torn off by accident after plea pleaded, the deed is held good (see 1 Roll. Rep. 40; *Michael v. Scockwith*, Cro. Eliz. 120); . . . and in these days, I think even if the seals were torn off before the action brought, there would be no difficulty in framing a declaration which would obviate every doubt upon that point, by stating the truth of the case. . . . The difficulty which arose in the old cases depended very much on the technical forms of pleading applicable to deeds alone."

CHAPTER III.

EXPRESSED INTENTIONS.

Expressed Intentions only regarded: General Purpose effected notwithstanding ineptitude of Form used: Instruments construed as Covenants to stand seised, Grants, Releases, Bargains and Sales, Feoffments, Leases, and Appointments.

Expressed intentions.

Rule 8.—To interpret a deed, we must discover the expressed intention of the parties.

Intention.

Explanatory Observation.—The word “intention” may be understood in two senses, as descriptive of, either (1) that which the parties intended to do, or (2) of the meaning of the words that they have employed; here it is used in the latter sense. See the remarks of Lord Wensleydale: *Abbott v. Middleton*, 7 H. L. C. at p. 114; *Grey v. Pearson*, 6 H. L. C. 106.

In other words, the question always is, “What is the meaning of what the parties have said?” not, “What did the parties mean to say?” The latter question is one which the law does not permit to be asked; it being a presumption *juris et de jure*, to rebut which no evidence is allowed, that the parties intended to say that which they have said.

“As far as it may stand with the rule of law, it is honourable for all Judges to judge according to the intention of the parties, and so they ought to do;” Co. Litt. 314b.

“ The question in this, and other cases of construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used ; ” per Lord Denman, C. J., *Rickman v. Carstairs*, 5 B. & Ad. 668.

“ The question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in that deed : a most important distinction in all classes of construction, and the disregard of which often leads to erroneous conclusions ; ” per Lord Wensleydale, *Monypenny v. Monypenny*, 9 H. L. C. 146.

“ I am disposed to follow the rule of construction which was laid down by Lord Denman and Baron Parke. . . . They said that in construing instruments you must have regard, not to the presumed intention of the parties, but to the meaning of the words which they have used ; ” per Brett, L. J., *Ex parte Chick, Re Meredith*, 11 Ch. D. 789.

“ One must consider the meaning of the words used, not what one may guess to be the intention of the parties ; ” per Jessel, M.R., *Smith v. Lucas*, 18 Ch. D. 542.

In *Throckmerton v. Tracy*, 1 Plowd. 160, the following rules were laid down by Staunford, J., for interpreting deeds : “ First, that deeds shall be taken most beneficially for the party to whom they are made (see rule 21) ; secondly, that a deed shall never be void, where the words may be applied to any intent to make it good (see rule 16) ; and upon this he cited *Bracton*, who saith, ‘ *Benigne faciendæ sunt interpretationes instrumenti, ut res magis valeat quam pereat*, ’ and in another place he saith, ‘ *in re dubiâ* ; ’ thirdly, that the words shall be construed according to the intent of the parties, and not otherwise ; and here he cited what *Bracton* saith, ‘ *Carta non est nisi vestimentum donationis*, ’ and the intent directs gifts more than the words.”

In *Smith v. Packhurst*, 3 Atk. 186 ; S.C. *sub nom. Parkhurst v. Smith*, Willes, 327, Willes, C. J., says, in delivering the unanimous opinion of the Judges to the House of Lords : “ I shall lay down some general rules and maxims

of the law, with respect to the construction of deeds. First, it is a maxim, that such a construction ought to be made of deeds, *ut res magis valeat quam pereat*, that the end and design of the deeds should take effect rather than the contrary (see rule 9). Another maxim is, 'that such a construction should be made of the words in a deed, as is made most agreeable to the intention of the grantor; the words are not the principal things in a deed, but the intent and design of the grantor; we have no power indeed to alter the words or to insert words which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject any words that are merely insensible.' "

In the great case of *Cholmondeley v. Clinton*, (2 Ja. & W. 91), Plumer, M. R., says: "The real intention of the framer of the deed, the written declaration of whose mind it is always considered to be, is the end and object to the discovery and effectuating of which all the rules of construction, properly so called, are uniformly directed. When technical words or phrases are made use of, the strong presumption is, that the party intended to use them according to their correct technical meaning (see p. 48); but this is not conclusive evidence that such was his real meaning. If the technical meaning is found, in the particular case, to be an erroneous guide to the real one, leading to a meaning contrary to what the party intended to convey by it, it ceases to answer its purpose. The deed may be drawn inartificially, from ignorance or inadvertence, or other causes; but still, if there is enough clearly to convey information as to the real meaning, the object is attained. The mind is with certainty discovered, and being known, must be the guide, or the act and deed would not be the act and deed of the party, but of the Court. Because the words, which are the signs of the ideas of the persons using them, are in general, and in the correct use of them, the signs of ideas different from those of which in the particular case, they are found less technically and correctly, but with equal certainty, to be the signs; can it follow that they are to be construed, to represent the ideas

Technical
words.

of which they are known not to be the signs, in preference to those of which they appear to be the signs? Where is the authority that compels the Court to go this length in its adherence to technical meaning? The contrary has been long and universally established to be the rule by the highest authorities from the earliest period, without a single one to the contrary. Many cases may doubtless be found, in which technical meaning has been allowed to prevail notwithstanding some appearance of a contrary intent; but this has been where the manifestation of intent was not deemed sufficient to get over the presumption in favour of legal construction. The paramount regard to be had, in a case circumstanced as the present, to the meaning and intention of the grantor, in preference to technical meaning, is the settled rule of construction. If the subject of the instrument, on which the question arises, be one that is not matter of law (over which intention has no control), but depends wholly on the will and act of the party, such as the appointment by a donor in a deed of gift of his own donee; if the words to be construed are not words of limitation (in which a stricter attention to forms may be required, especially in deeds), but words of purchase and description made use of to designate the person of the first taker; in such case, if the meaning and intention of the grantor be clearly manifested on the face of the instrument, as to the person or character intended to be the object of grant, and if the words that he has made use of to convey his meaning will admit of an interpretation conformable to it, though contrary to their correct technical sense, there is no case or dictum to be found which requires the Court to adopt the technical sense in opposition to the actual meaning of the party; on the contrary, the authorities uniformly demand the preference to be given to intent, over technical import and form."

"It is a good rule of construction that deeds should be construed so as to give effect to the intention of the parties;" per Abbott, C. J., *Evans v. Vaughan*, 4 B. & C. 266; and per Pearson, J., *Hilbers v. Parkinson*, 25 Ch. D. 203.

“ I adopt the observations of C. B. Alexander, in *Colmore v. Tyndall* (2 Younge & J. 622), that this Court deals with a deed according to the clear intention of the parties appearing in the four corners of the deed itself. If the Court sees an intention clearly and distinctly established by it, it has no difficulty in carrying that into effect, subject of course to any rules of law that may be applicable to it, but only qualified to that extent;” per Sir J. Romilly, M. R., *Beaumont v. Marq. of Salisbury*, 19 Beav. 206.

In *Clayton v. Glengall*, (1 Dr. & W. 14), Lord St. Leonards says: “ It is quite true, I am not to conjecture or guess at what might have been the intention of the parties; but I am to consider the whole instrument, and if there appear a plain intention to give interest, then, though there should be no express words to that effect, and this is the case of a deed, yet I am bound to give it that construction.”

“ The rule of construction is to adhere as rigidly as possible to the express words;” per Lord Cranworth, C., *Grey v. Pearson*, 6 H. L. C. 78.

Deeds failing
to take effect
in manner
intended.

Rule 9.—If, owing to some rule of law, a deed fail to take effect in the manner intended, it will, if possible, be construed so as to take effect in some other manner which will carry the expressed general intention of the parties into effect.

“ The rules laid down in respect of the construction of deeds are founded in law, reason, and common sense; that they shall operate according to the intention of the parties, if by law they may; and if they cannot operate in one form, they shall operate in that which by law will effectuate the intention;” per Lord Mansfield, C. J., *Goodtitle d. Edwards v. Bailey*, 2 Cowp. 600. See to the same effect, per Dallas, C. J., *Solly v. Forbes*, 4 Moo. 463.

“ A deed that is intended and made to one purpose may enure to another, for if it will not take effect in the way

it is intended, it may take effect another way, provided it may have that effect consistently with the intention of the parties. And therefore a deed made and intended for a release, may amount to a grant of a reversion, an attornment, or a surrender, or *à converso*; Shep. Touch. 82. See also the notes to *Chester v. Willan*, 2 Wms. Saund. 96a.

Examples.—Deeds of the natures following, not taking effect in the manner in which they were intended, have, where there was relationship between the parties, taken effect as covenants to stand seised:—A deed of feoffment without livery; *Walker v. Hall*, 2 Lev. 213; *Thompson v. Attfeild*, 1 Vern. 40: and even where the feoffee to uses was not a relation, though the *cestui que use* was; *Thorne v. Thorne*, 1 Vern. 141, (see the bill at length, 2 M. & W. 512, note); *Hore v. Dix*, 1 Sid. 25; cit. 2 M. & W. 507, is *contrà*, but is overruled, 2 Wils. 79; *Sleigh v. Metham*, Lutw. 242, (Nelson's ed.); *Doe d. Lewis v. Davies*, 2 M. & W. 503: a deed poll professing to grant an estate of freehold commencing *in futuro*; *Doe d. Starling v. Prince*, 20 L. J. N. S. C. P. 223; *Rigden v. Vallier*, 2 Ves. Sen. 253: a release founded on lease for a year, but void as creating a freehold to commence *in futuro*; *Roe d. Wilkinson v. Tranmer*, 2 Wils. 75; S. C. Willes, 682: a deed of grant; *Osman v. Sheafe*, 3 Lev. 370; S. C. *sub nom. Osmere v. Sheafe*, Carth. 307; *Doe d. Daniell v. Woodroffe*, 10 M. & W. 608; *Harrison v. Austin*, Carth. 38; *Sanders v. Savile*, cited 3 Lev. 372; *Doe d. Starling v. Prince*, 20 L. J. N. S. C. P. 223: a covenant "that he giveth and settleth;" *Doe d. Jones v. Williams*, 5 B. & Ad. 783: "that if he die without issue, he does give and grant;" *Coltman v. Senhouse*, 2 Lev. 225; S. C., T. Jones, 105: a bargain and sale void for want of a pecuniary consideration; *Crossing v. Scudamore*, 2 Lev. 9; S. C. 1 Mod. 175; 1 Vent. 137; (*sub nom. Crossing v. Skidmore*, 2 Keb. 754, 784;) *Baker v. Lade*, 3 Lev. 291; S. C. (*sub nom. Barker v. Lade*), 4 Mod. 150; 2 Vent. 149; Carth. 253; (*sub nom. Baker v. Lane*), Skin. 315; *Wats v. Dix*, Sty. 204; *Tebbe v. Popplewell*, 2 Roll. Ab. 706, pl. (1):

Deeds construed as covenant to stand seised—

a release founded on a lease for a year that was lost; *Brown v. Jones*, 1 Atk. App. 191: a surrender void by reason of an intervening estate; *Doe d. Woolley v. Pickard*, per Lord Kenyon, cited 1 Wms. Saund. 286f, (note): a conveyance made in consideration of an intended marriage, which could not operate as a bargain and sale, because there was no pecuniary consideration, nor as a release because there was no lease for a year, nor as a confirmation, because neither of the grantees was in possession, nor as a feoffment, because there was no livery; *Doe d. Milbourne v. Salkeld*, Willes, 674; S. C. *sub nom. Doe v. Purchasers under Assignees of Simpson*, 2 Wils. 22.

as grant at
common law ;

Deeds of the natures following, not taking effect in the manner in which they were intended, have taken effect as grants at common law:—A grant of a reversion has been effected by a deed of feoffment which could not operate as a feoffment for want of livery; 2 Roll. Ab. 56, pl. 1; *Knotsford v. Edes*, Ibid., pl. 2; *Lucy v. Englefield*, Ibid., pl. 3; *Doe d. Were v. Cole*, 7 B. & C. 248; S. C. 1 Man. & Ry. 33: by a bargain and sale void for want of enrolment; *Adams v. Steer*, Cro. Jac. 210; *Nash v. Ash*, 1 Hurl. & Colt. 160: by a bargain and sale enrolled but incapable of carrying out the intention of the parties by reason of the non-execution of the uses declared thereby; *Haggerston v. Hanbury*, 5 B. & C. 101; S. C. 7 D. & R. 728, over-ruling *Denton v. Fettiplaces*, case cit. Cro. Jac. 210: by a release void as creating a freehold *in futuro*; *Goodtitle d. Edwards v. Bailey*, 2 Cowp. 600: by an appointment void by reason of the non-existence of the power; *Shove v. Pincke*, 5 T. R. 124; and see *Perry v. Watts*, 3 Man. and Gr. 775.

Where the donee of a power of appointment “*limited and appointed*” by deed, not only the lands the subject of the power, but also other lands, it was held that the words “*limit and appoint*” operated as a grant of the latter lands; *Macandrew v. Gallagher*, Ir. R. 8 Eq. 490.

A grant of an easement or profit *à prendre* may be effected by articles of agreement under seal; *Holms v. Seller*, 3 Lev. 305: or by a covenant; *Lord Mountjoye’s*

Case, Moo. 174 ; *Godby*. 17 ; see cases cited, Tud. L. C. R. P. 170. :

A release has been effected by a deed which could not ^{as release ;} take effect as a feoffment for want of livery, the want of livery being supplied by the possession of a tenant ; *Rees d. Chamberlain v. Lloyd*, Wightw. 128 : by a grant by one joint tenant to another ; *Chester v. Willan*, 2 Wms. Saund. 96a : by a grant that the obligor should not be sued by force of his bond ; 21 H. 7, 23b ; S. C. Bro. Ab. tit. Barre. 52 ; see *Plow*. 156.

A father by indenture enrolled, in consideration of his natural affection to his son, bargained and sold, gave, granted, and confirmed the land to him and his heirs. Held that as the son was in possession it might operate by way of confirmation ; *Osborn v. Churchman*, Cro. Jac. 127.

“In case when a freehold or inheritance shall pass by ^{as bargain and sale ;} deed indented and enrolled, it need not have the precise words of bargain and sale, but words equipollent or which do tantamount, are sufficient ; as if a man covenants in consideration of money to stand seised to the use his son in fee ; if the deed be enrolled, it is a good bargain and sale, and yet there are not any words of bargain and sale, but they amount to so much, as it is held in *Bedel's Case* (7 Rep. 40b). So if a man for money aliens and grants land to one and his heirs, or in tail, or for life, by deed indented and enrolled, it amounts to a bargain and sale, and the land shall pass without any livery and seisin ; *Fox's Case*, 8 Rep. 94a ; see also *Taylor v. Vale*, Cro. Eliz. 166, where the words are “*dedit et concessit*.”

Where A. by deed indented conveyed as follows :—
“I the said A. have given, granted, and confirmed for a certain piece of money,” without any words, “bargain and sell,” the habendum was to the feoffee with warranty against A. and his heirs, and there was a letter of attorney to make livery of seisin. The deed was enrolled within one month after it was made, subsequently the attorney made livery. Held that it operated as a bargain and sale ; *Anon.* 3 Leon. 16.

as feoffment ; Charter of feoffment containing words of bargain and sale only, followed by livery, operated as a feoffment ; *Benicombe and Parker's Case*, 1 Leon. 25.

as uses of fine ; The uses of a fine may be declared by a bargain and sale not enrolled, or a feoffment without livery ; *Jones v. Morley*, 1 Ld. Ray. 291.

as assignment ; Covenant to transfer a specific part of a sum of money on mortgage within three months after death and to pay interest in the meantime, operated as an assignment ; *Brownlow v. Earl of Meath*, 2 Ir. Eq. Rep. 383 ; S. C. 2 Dr. & Wal. 674.

as lease. "Albeit the most usual and proper mode of making of a lease is by the words, demise, grant, and to farm let, and with an *habendum* for life or years, yet a lease may be made by other words ; for whatsoever word will amount to a grant will amount to a lease. And therefore a lease may be made by the word, give, betake, or the like. The word *locavit* [hired] also is a good word. And the use in the Exchequer is to make leases by the word *committimus*, which is a good word to make a lease. And if A. do but grant and covenant with B. that B. shall enjoy such a piece of land for twenty years, this is a good lease for twenty years. So if A. promise to B. to suffer him to enjoy such a piece of land for twenty years ; this is a good lease for twenty years. So if A. license B. to enjoy such a piece of land for twenty years ; this is a good lease for twenty years ;" Shep. Touch. 271, 272.

Accordingly, a lease has been created by a covenant with a man that he should enjoy the land for a certain time : *Whitlock v. Horton*, Cro. Jac. 91 ; *Drake v. Munday*, Cro. Car. 207 ; S. C. W. Jo. 231 ; *Tisdale v. Essex*, Hob. 34 ; S. C. Moo. 861 ; *Richard v. Sely*, 2 Mod. 79 ; *Doe d. Jackson v. Ashburner*, 5 T. R. 183 : by a mere licence to occupy for a certain time ; 5 H. 7, 1 ; Bro. Ab. tit. Lease, 30 ; *Hall v. Seabright*, 1 Mod. 14 ; S. C. 2 Keb. 561 ; *Anon.* (Ca. 51) ; 11 Mod. 42 ; *Right d. Green v. Proctor*, 4 Bur. 2208 : by a covenant to stand seised ; *Right d. Basset v. Thomas*, 3 Bur. 1441, 1446 ;

S. C. 1 W. Bl. 446 : by a covenant to pay rent followed by entry ; *Copley v. Hepworth*, 12 Mod. 1.

Where a term had become merged in the inheritance, and the owner of the inheritance "granted, bargained, sold, assigned and set over" the premises for the residue of the original term, it was held that there was a resuscitation of the term by the words *grant*, *bargain*, and *sell*, as well as *assign* ; *Denn d. Wilkins v. Kemeys*, 9 East, 366 ; *Cottee v. Richardson*, 7 Ex. 143 ; but Shadwell, V.-C., held a contrary opinion in *Law v. Urlwin*, 16 Sim. 377 (where the operative word was "assign" only).

But a lease is not created by a covenant with a man that a stranger shall enjoy land for a certain term ; *Littleton and Pernes' Case*, 1 Leon. 136 ; *Parry v. Allen*, Cro. Eliz. 173.

A covenant by the tithe-owner with the land-owner not to take tithes for a certain time, was held not to amount to a lease of them ; *Brewer v. Hill*, 2 Anst. 413.

The cases as to when an agreement for a lease amounts to a lease are collected in Woodfall, 143 ; 5 Dav. Prec.

The words "grant, bargain, sell, and demise" were held to operate by way of *assignment* of a term in *Beaumont v. Marq. of Salisbury*, 19 Beav. 198 ; *Marshall v. Frank*, Gilb. R. 143.

To the same rule may be referred the cases under Powers. which deeds, not referring to a power, have operation as an execution of it.

. An instrument, in order to operate as an execution of a power, "must either refer to the power, or to the property subject to the power, or it must affect to deal with some property in general terms, not defining it, under such circumstances that it cannot have effect except upon the property comprised in the power ; as for instance where a testator gives all his real estate, having no real estate of his own, but having only a power over real estate ;" per Wood, V.-C., *Broderick v. Brown*, 1 K. & J. 332. The cases on this point will be found in Sugden on Powers,

201 (8th edit.) ; Farwell on Powers, 146 ; it is unnecessary to discuss them at length as most of them arise on wills.

A power of appointment among children has been held to be exercised by a feoffment ; *Daniel v. Ubley*, W. Jo. 187 : by a lease and release ; *Tomlinson v. Dighton*, 1 P. Wms. 149 : by a recital ; *Wilson v. Piggott*, 2 Ves. Jun. 351, 354a : and a power of jointuring has been held to be exercised by a covenant to stand seised ; *Stapleton's Case*, cited 1 Vent. 228 ; *Lady Hastings' Case*, cited 3 Keb. 511 : and by lease and release ; *Dyer v. Awister*, cited 1 P. Wms. 165 ; S. C. *sub nom. Gier v. Ossiter*, cited 10 Mod. 84 ; a general power of appointment by a recital ; *Poulson v. Wellington*, 2 P. Wms. 533 ; S. C. 2 Eq. Ca. Ab. 131 : by a lease and release ; *Snape v. Turton*, Cro. Car. 472, W. Jones, 392.

Where the donee of a power has also an interest, and the deed executed by him refers to the power, it operates as an execution of the power ; otherwise, it operates on his interest. But where the deed does not refer to the power, and cannot take effect on his interest, it will operate as an execution of the power ; *Sir E. Clere's Case*, 6 Rep. 17b ; *Colt and Glover v. Bp. of Coventry and Lichfield*, Hob. 140, 160 ; but see *Browne v. Taylor*, Cro. Car. 38 ; Sugden on Powers, 343 (8th ed.) ; Farwell, Pow. 211.

CHAPTER IV.

EXTRINSIC EVIDENCE AS TO MEANING OF WORDS.

Extrinsic Evidence admissible to determine the Primary Meanings of the words employed: Explanation of Primary Meanings: Interpretation of Mercantile Contracts: Technical Words: Practice of Conveyancers: Word defined by Act of Parliament.

Rule 10.—When the words used in a deed are in their primary meanings unambiguous (*a*), and when such meanings are not excluded by the context (*b*), and are sensible with respect to the circumstances of the parties (*c*) at the time of executing the deed, such primary meanings must be taken to be those in which the parties used the words.

Words to be taken in primary meanings.

Rule 11.—Extrinsic evidence is admissible for the purpose of determining the primary meanings of the words employed, and for no other purpose whatsoever.

Extrinsic evidence.

(*a*) See *Cholmondeley v. Clinton*, 2 Mer. 344; S. C. 2 J. & W. 69. Even absurd consequences will not be sufficient to exclude the primary meaning; *Laird v. Tobin*, 1 Moll. 547; cf. 2 Mor. 343; but see *Wallis v. Smith*, 21 Ch. D. at p. 257.

(*b*) *Cholmondeley v. Clinton*, 2 J. & W. 67, 69, 80; *Holloway v. Holloway*, 5 Ves. 399; *Lloyd v. Lloyd*, 2 My. & Cr. 202; *Monypenny v. Monypenny*, 4 K. & J. 182; *Hext v. Gill*, L. R. 7 Ch. 705; *Laird v. Briggs*, 19 Ch. D. 34.

(*c*) *Sidney v. Shelley*, 19 Ves. 366; *Cholmondeley v. Clinton*, 2 Mer. 344; *Hart v. Hart*, 18 Ch. D. 692, 693; *Tucker v. Linger*, 21 Ch. D. 36. *Cannon v. Villars*, 8 Ch. D. at p. 419; *Inglis v. Buttery*, 3 App. Ca. at p. 578.

Primary
meaning.

Explanatory Observations.—First: By “*primary*” (sometimes called “*literal*”) “*meaning*,” is intended not the primary etymological meaning, but either (1), the meaning usually affixed to the words at the time of the execution of the deed, by persons of the class to which the parties belonged ; or (2), the meaning in which the words must have been used by the parties, having regard to their circumstances at the time of execution ; or (3), the meaning which it can be conclusively shown that the parties were in the habit of affixing to the words.

Technical
words.

Second: The primary meaning of a technical word in a deed relating to the art or science to which it belongs, is its technical meaning (post, pp. 57, 62).

These rules were discussed very fully in *Shore v. Wilson*, 9 Cl. & F. 355, where Coleridge, J. (at p. 525), says: “It is unquestionable that the object of all exposition of written instruments must be to ascertain the expressed meaning or intention of the writer ; the expressed meaning being equivalent to the intention, and I believe the authorities to be too numerous and clear to make it convenient or necessary to cite them, that, where language is used in a deed which in its primary meaning is unambiguous, and in which that meaning is not excluded by the context (see rule 16), and is sensible with reference to the extrinsic circumstances in which the writer was placed at the time of writing, such primary meaning must be taken, conclusively, to be that in which the writer used it ; such meaning, in that case, conclusively states the writer’s intention, and no evidence is receivable to show that in fact the writer used it in any other sense, or had any other intention. This rule, as I state it, requires perhaps two explanatory observations ; the first, that if the language be technical or scientific, and it is used in a matter relating

to the art or science to which it belongs, its technical or scientific must be considered its primary meaning; the second, that by 'sensible with reference to the extrinsic circumstances' is not meant that the extrinsic circumstances make it more or less reasonable or probable is (d) what the writer should have intended; it is enough if those circumstances do not exclude it, that is, deprive the words of all reasonable application according to such primary meaning."

Shore v. Wilson.

"This rule thus explained, implies that it is not allowable in the case supposed to adduce any evidence, however strong, to prove an unexpressed intention varying from that which the words used import. This may be open no doubt to the remark, that, although we profess to be exploring the intention of the writer, we may be led in many cases to decide contrary to what can scarcely be doubted to have been the intention, rejecting evidence which may be most satisfactory in the particular instance to prove it. The answer is, that interpreters have to deal with the written expression of the writer's intention, and Courts of Law to carry into effect what he has written, not what it may be surmised, on however probable grounds, that he intended only to have written (e). In proportion as we are removed from the period in which an author writes, we become less certain of the meaning of the words he uses; we are not sure that at that period the primary meaning of the words was the same as now, for by the primary is not meant the etymological, but that which the ordinary usage of society affixes to it. We are also equally uncertain whether at that period the words did not bear a technical or conventional sense; and whether they were not so used by the writer."

Unexpressed intentions.

Mr. Baron Parke (at p. 555), says: "I apprehend that there are two descriptions of evidence (the only two which bear upon the subject of the present inquiry), and which are clearly admissible in every case for the purpose of enabling a Court to construe any written instrument, and

(d) *Sic.* Query "that the primary meaning is."

(e) See per Jessel, M.R., *Smith v. Lucas*, 13 Ch. D. 542.

Foreign
language,
technical
words.

to apply it practically. In the first place, there is no doubt that not only where the language of the instrument is such as the Court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent, where technical words or peculiar terms, or indeed any expressions are used, which at the time the instrument was written, had acquired an appropriate meaning, either generally or by local usage, or amongst particular classes. The authorities in support of this position are *The Attorney-General v. The Plate Glass Co.*, 1 Anst. 39; *Goblett v. Beechy*, 8 Sim. 24; *Smith v. Wilson*, 8 B. & Ad. 728; *Richardson v. Wilson*, 4 B. & Ad. 787; and *Clayton v. Gregson*, 5 Ad. & E. 302."

Evidence as to
circumstances.

"This description of evidence is admissible, in order to enable the Court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which this instrument is intended to operate. For the purpose of applying the instrument to the facts, and determining what passes by it, and who take an interest under it, a second description of evidence is admissible, viz., every material fact that will enable the Court to identify the person or thing mentioned in the instrument, and to place the Court whose province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it. The authorities for this position are also numerous; they are referred to in Vice-Chancellor Wigram's excellent Treatise on the Admission of Extrinsic Evidence, under the Fifth Proposition (p. 53, 3rd edit.). From the context of the instrument, and from these two descriptions of evidence, with such circumstances as by law the Court, without evidence, may of itself notice, it is its duty to construe and apply the words of that instrument; and no extrinsic evidence of the intention of the party to the deed, from his declarations, whether at the time of his executing the instrument, or before or after that time, is admissible; the duty of the

Court being to declare the meaning of what is written in the instrument, not of what was intended to have been written." Evidence as to circumstances.

Lord Chief Justice Tindal (at p. 565), says : " The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves ; and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it, for the ablest advice might be controlled and the clearest title undermined, if at some future period parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself."

" The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself ; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of in-

Ancient
documents.

Technical
words.

struments written in a foreign language; in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed; in cases where terms of art or science occur, in mercantile contracts, which in many instances use a peculiar language employed by those only who are conversant in trade and commerce; and in other instances in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well-known peculiar idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. In all these cases evidence is admitted to expound the real meaning of the language used in the instrument, in order to enable the Court or judge to construe the instrument, and to carry such real meaning into effect."

Evidence as to
intention.

"But whilst evidence is admissible in these instances for the purpose of making the written instrument speak for itself, which without such evidence would be either a dead letter, or would use a doubtful tongue, or convey a false impression of the meaning of the party, I conceive the exception to be strictly limited to cases of the description above given, and to evidence of the nature above detailed; and that in no case whatever is it permitted to explain the language of a deed by evidence of the private views, the secret intentions, or the known principles of the party to the instrument, whether religious, political, or otherwise, any more than by express parol declarations made by the party himself, which are universally excluded, for the admitting of such evidence would let in all the uncertainty before adverted to; it would be evidence which in most instances could not be met or countervailed by any of an opposite bearing or tendency, and would in effect cause the secret undeclared intention of the party to control and predominate over the open intention expressed in the deed."

In *Drummond v. The Attorney General for Ireland*, 2

H. of L. 887, Lord Brougham says (at p. 862): “The Circumstances.
evidence was admissible in this case for the purpose of showing the circumstances in which the party was when making the instrument. You admit it as you admit evidence in construing a will, not to modify the expressions of the will, not to affix a sense upon the will it does not bear, not to tell you what the meaning of the will is, but to tell you what were the circumstances in which the testator was when he used those expressions, for the purpose of enabling you to ascertain what meaning he affixed to the expressions that he used, and for no other purpose.”

Lord Campbell says (at p. 868); “In construing such Usage.
an instrument, you may look to the usage to see in what sense the words were used at the time; you may look to contemporaneous documents, as well as to Acts of Parliament, to see in what sense the words were used in the age in which the deeds were executed (*Shore v. Wilson*, 9 Cl. & F. 418, *et seq.*); but to admit evidence to show the sense in which words were used by particular individuals, is contrary to sound principle.

In *The Attorney-General v. Clapham*, 4 De G. M. & G. Circumstances.
591, Lord Cranworth (at p. 627), says: “In *Lady Hewley's Case*, *Shore v. Wilson* (9 Cl. & Fin. 355), and in the later case from Dublin, *Drummond v. The Attorney-General* (1 Dru. & War. 353; and S. C. on appeal, 2 H. of L. Cas. 887), parol evidence was received only to enable the Court to understand and construe the deed under which the trusts existed. The great question in the former case was as to what was the sense in which the words “Godly Preachers of Christ's Holy Gospel” were to be understood in the deed creating the trust, and in the latter the question was in like manner as to the meaning of the words “Protestant Dissenters.” In both these cases the parol evidence was necessary, in order to enable the Court rightly to understand the deed. Certain words were used which it was necessary to construe, and this could not be done without admitting a great deal of evidence as to the state of religious parties at the time

when the deeds were framed. For such a purpose the evidence was most reasonable. It was like the evidence afforded by a dictionary, which enables us to translate a foreign language ; or a book of science which gives us the meaning of words of art."

A written instrument "is to be construed according to its sense and meaning, as collected, in the first place, from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words ; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense ;" per Lord Ellenborough, C. J., *Robertson v. French*, 4 East, 185.

Usage.

Context.

Usage.

"As words and phrases of speech are to be expounded and construed as they are generally understood, so it is likewise in particular places ; and therefore, if I covenant to convey to another an acre of land in *Cornwall*, the common acceptance of the word 'acre' there amounts to as much as a hundred of other counties, so 'a perch' in *Staffordshire* is as much as twenty perches in some other places, therefore such words must be governed by the common and known acceptance of the people ;" per *Curiam*, *Barksdale v. Morgan*, 4 Mod. 185.

"In my view the principle upon which words are to be construed in instruments is very plain—where there is a popular and common word used in an instrument, that word must be construed *primâ facie* in its popular and common sense. If it is a word of a technical or legal character, it must be construed according to its technical or legal meaning. If it is a word which is of a technical or scientific character, then it must be construed according to that which is its primary meaning, namely, its technical and scientific meaning. But before you can give evidence of the secondary meaning of a word, you must satisfy the

Technical words.

Court from the instrument itself or from the circumstances of the case that the word ought to be construed, not in its popular or primary signification, but according to its secondary intention : " per Fry, J., *Holt v. Collyer*, 16 Ch. D. 720.

" This is the first time I have ever known it doubted, Circumstances.
whether the estate, and interest, and powers of the settlor over the estate he was settling was admissible in proof. I am not offering declarations of what the party said she meant, I am not construing a legal instrument by the acts of the parties, or by their understanding upon it ; but, by showing the circumstances and situation of the party, I am enabling the House to judge what, in legal construction, was her meaning. And I am not aware that there is any legal authority to exclude the evidence of such circumstances and situation. If a man makes any deed or will, have I not a right to know what estate he had at the time he made such deed or will ; and does not the construction vary, in some cases, according to the estate ? If I grant a man an estate for life, without saying whether for his life or mine, is not evidence admissible to show what interest I had in the premises ? for, if I was tenant in fee, he will take an estate for his own life ; if I was tenant in tail or for life only, he will take for mine (f). If a man bequeath me £10,000 £3 per cent. consols, it will be a specific legacy if he have that stock at the time, not specific, if he have it not : " per Bayley, J., *Smith v. Doe d. Jersey*, 2 Brod. & Bing. 550. In that case a settlement contained a power to grant leases, " so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved ; " the power of re-entry inserted into the lease was in case the rent should be unpaid for fifteen days, and there should not be sufficient distress, or in certain other events ; *held*, that evidence was admissible as to the form of the power of re-entry inserted in leases of the estate prior to the settlement : see per Lord Eldon, L. C., at p. 602, *et seq.*

(f) See Co. Litt. 42a.

"To ascertain the meaning of the words used in the writing, every part of it must be considered with the help of those surrounding circumstances which are admissible in evidence to explain the words, and put the Court as nearly as possible in the situation of the writer of the instruments;" per Lord Wensleydale, *Grey v. Pearson*, 6 H. L. C. 106.

"That which he has written is to be construed by every part of it being taken into consideration according to its grammatical construction, and the ordinary acceptation of the words used, with the assistance of such parol evidence of the surrounding circumstances as is admissible to place the Court in the position of the testator;" per Lord Wensleydale, *Roddy v. Fitzgerald*, 6 H. L. C. 876.

Equivocation.

Exception.—It will be seen (Chapter VIII., *post*) that in cases of equivocation, by which is meant cases where the description in the document of a person or thing is equally applicable to several persons or things, direct evidence of intention (see *post*, p. 107) is admissible to determine which of such persons or things the writer intended to point out by such description.

Foreign
language.

There are also two apparent exceptions: first, where the document is written in a foreign language, in which case a translator must be employed; and second, where the document is so illegible that the Court cannot read it, or written in cypher, *Kell v. Charmer*, 23 Beav. 195, in which cases the evidence of experts is admissible to determine what were the words employed or meant. It seems that where it is alleged that the document is illegible, it is for the Court and not for the jury, to decide whether it is illegible; in other words the Court will not resort to the evidence of experts to decipher the instrument, unless it is unable to do so for itself; *Remon v. Hayward*, 2 Ad. & El. 666.

Illegible
document.

Dictionary,

It should be added that the Court may refer to a dictionary for the purpose of ascertaining the meaning of a word; *Matthew v. Purchings*, Cro. Jac. 203.

Mercantile Contracts.

The rule that technical words must bear their technical meanings in instruments relating to the art or science to which they belong, is of the greatest importance in the interpretation of mercantile contracts, the rule as to which appears to be laid down correctly by the learned authors of Manning and Granger's Reports, in the note to *Lewis v. Marshall*, 7 Man. & Gr. 745, viz. :—

Rule 12.—In construing a *usual* mercantile contract, the question is, in what sense have the terms been used in similar contracts? In the case of an *unusual* contract, have the terms acquired any, and what, peculiar meaning in general mercantile language or in the particular trade?

Rule as to
mercantile
contracts.

In *Myers v. Sarl*, 3 El. & El. 306, Cockburn, C. J., says (at p. 315) : “ the duty of the Court is so to construe a contract as to give effect to the intention of the parties. Now, although parol evidence is not admissible to contradict a contract, the terms of which have but one ordinary meaning and acceptance, yet if the parties have used terms which bear not only an ordinary meaning, but also one peculiar to the department of trade or business to which the contract relates, it is obvious that due effect would not be given to the intention, if the terms were interpreted according to their ordinary and not according to their peculiar signification. Therefore, whenever such a question has come before the Courts, it has always been held that where the terms of the contract under consideration have, besides their ordinary and popular sense, also a peculiar and scientific meaning, the parties who have drawn up the contract with reference to some peculiar department of trade or business, must have intended to use

the words in the peculiar sense. This is but an application of the well-known rule that the interpretation of contracts must be governed by the intention of the parties. And from the nature of the case, the peculiar meaning of the terms used can be discovered only by means of parol evidence."

In the same case (at p. 318), Hill, J., says: "Now the rule governing the admissibility of evidence to explain the language of contracts is, that words relating to the transactions of common life are to be taken in their plain, ordinary and popular meaning; but if a contract be made with reference to a subject-matter as to which particular words and expressions have by usage acquired a peculiar meaning different from their plain ordinary sense, the parties to such a contract, if they use those words or expressions, must be taken to have used them in their restricted and peculiar signification. And parol evidence is admissible of the usage which affixes that meaning to them. The admissibility of such evidence does not depend upon whether the expression to be construed is ambiguous or unambiguous; but merely upon whether or not the expression has, with reference to the subject-matter of the contract, acquired the peculiar meaning."

In the same case (at p. 319), Blackburn, J., says: "I agree with my brother Hill that the words of a written commercial contract are to be understood in the sense which they have acquired in the trade to which the contract relates. It is a *prima facie* presumption that, if the parties to such a contract use expressions which bear a peculiar meaning in the trade, they use them in that peculiar meaning; which can be ascertained only by parol evidence. I do not think that it is necessary, in order to render such evidence admissible, that there should be any ambiguity on the face of the phrase which has to be construed. . . . That I take to be the true rule of law upon the subject; that when it is shown that a term or phrase in a written contract bears a peculiar meaning in the trade or business to which the contract relates, that meaning is,

prima facie, to be attributed to it, unless, upon the construction of the whole contract, enough appears, either from express words or by necessary implication, to show that the parties did not intend that meaning to prevail."

In *Bowes v. Shand*, 2 App. Ca., at pp. 462, 468, Lord Cairns, L.C., says: "The Court it is which, when once it is in possession of the circumstances surrounding the contract, and of any peculiarity of meaning which may be attached by reason of the custom of the trade, to any of the words of that contract, has to place the construction upon the contract. . . . Now having submitted to your lordships what I understand to be the natural and literal meaning of this contract, I ask how is that natural meaning to be got rid of? My Lords, I conceive in this way, and only in this way. It was of course competent for those who were resisting the application of this natural construction of the contract, to have said: 'We will prove by evidence that according to the custom of the trade, these words, which have this natural signification, are used in a wider or in a different sense.' . . . That of course would, according to the well-known rule of law which admits parol evidence, not to contradict a document, but to explain the words used in it, supply, as it were, the mercantile dictionary in which you are to find the mercantile meaning of the words which are used. That would be a legitimate and well-known mode of construing the document."

Tindal, C.J., in delivering judgment in *Lewis v. Marshall*, 7 Man. & Gr. 729 (at p. 744), says: "On the present occasion, the question was, whether there was a recognised practice and usage with reference to the voyage and business out of which the written contract, the subject-matter of the action, arose, and to which it related, which gave a particular sense to the words employed in it, so that the parties might be supposed to have used these words in such sense.

"The character and description of evidence admissible for that purpose is, the fact of a general usage and practice prevailing in the particular trade or business, not the judgment and opinion of the witnesses; for the contract

may be safely and correctly interpreted by reference to the fact of usage ; as it may be presumed, that such fact is known to the contracting parties, and that they contract in conformity thereto ; but the judgment or opinion of the witnesses called affords no safe guide for interpretation, as such judgment or opinion is confined to their own knowledge."

In *Brown v. Byrne*, 3 El. & Bl. 708, Coleridge, J., says (at p. 715), "Mercantile contracts are very commonly framed in a language peculiar to merchants : the intention of the parties, though perfectly well known to themselves, would often be defeated if this language were strictly construed according to its ordinary import in the world at large : evidence, therefore, of mercantile usage and custom is admitted in order to expound it and arrive at its true meaning. . . . In the construction of a contract among merchants, tradesmen or others, the evidence will not be excluded because the words are in their ordinary meaning unambiguous ; for the principle of admission is, that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that."

Examples.

Examples of cases in which evidence has been admitted to explain technical words :—

In a building contract : "weekly account ;" *Myers v. Sarl*, 3 El. & Bl. 806 : "per superficial yard of work nine inches thick ;" *Symonds v. Lloyd*, 6 C. B. N. S. 691.

In a charter-party : "in regular turns of loading ;" *Leidemann v. Schultz*, 14 C. B. 88 ; see also *Hudson v. Clementson*, 18 C. B. 213 ; "in regular turn ;" *Lawson v. Burness*, 1 H. & C. 396 ; "in turn to deliver ;" *Robertson v. Jackson*, 2 C. B. 412.

In a contract relating to sport : "across country ;" *Evans v. Pratt*, 3 Man. & Gr. 759 : "P. P. ;" *Daintree v. Hutchinson*, 10 M. & W. 85.

In a theatrical agreement : "three years ;" *Grant v. Maddox*, 15 M. & W. 787.

In a contract of service : "to serve from 11 Nov. next until 11 Nov., 1817 ;" (the evidence was to show

that certain holidays were allowed): *Reg. v. Inhabitants of Stoke-upon-Trent*, 5 Q. B. 303: "the same ground" (the servant being a commercial traveller); *Mumford v. Gething*, 7 C. B. N. S. 305.

In a contract for sale: "sold 18 pockets Kent hops at 100s." (to show that the price was meant to be £5 per cwt.); *Spicer v. Cooper*, 1 Q. B. 424: "good" and "fine" barley; *Hutchinson v. Bowker*, 5 M. & W. 535: "mess pork of Scott & Co." (to show that this meant manufactured by Scott & Co.); *Powell v. Horton*, 2 Bing. N. C. 668: "bale" of gambier (to show that by usage it meant a package of a particular description); *Gorissen v. Perrin*, 2 C. B. N. S. 681.

In an agreement for an agricultural lease: "mines and minerals;" *Tucker v. Linger*, 21 Ch. D. 18; S. C. 8 App. Cas. 508.

In a mining lease: "level;" *Clayton v. Gregson*, 5 Ad. & El. 302.

In a policy of insurance on a ship: to show that the words "the East Indies, East India Islands," included the Mauritius: *Robertson v. Clarke*, 1 Bing. 445.

In a lease of a rabbit warren: that by custom of the country "one thousand rabbits" means 1,200: *Smith v. Wilson*, 3 B. & Ad. 728.

In an open policy on freight: that "freight" meant by usage the gross, and not the net amount of the freight: *Palmer v. Blackburn*, 1 Bing. 61.

In a bill of lading: "freight for the said goods five-eighths of a penny sterling per pound, with five per cent. primage and average accustomed;" to show that by custom three months' interest or discount is deducted from freights payable under bills of lading on goods coming from certain ports: *Brown v. Byrne*, 3 El. & Bl. 703. "Freight at the rate of 80s. per ton of 20 cwt., gross weight, tallow, other goods, grain, or seed, in proportion, as per London Baltic printed rates:" *The Russian Steam Navigation Co. v. Silva*, 13 C. B. N. S. 610.

Technical Legal Terms.

Technical
legal terms.

In the application of the rule to the interpretation of a deed containing technical legal terms, we must remember that the draftsman probably used them in their technical meanings, and accordingly we must affix such meanings to them, unless they are excluded by the context.

The rule is applied to the construction of Acts of Parliament, *Laird v. Briggs*, 19 Ch. D. 22.

In *Roddy v. Fitzgerald*, 6 H. L. C., 823, Lord Wensleydale, in laying down the rules for the interpretation of wills, which do not appear to differ in this respect from those employed for deeds, says (at p. 877): "It is a most important rule in the construction of the words used in a will that technical terms, or words of known legal import, must have their proper legal effect attributed to them, although the testator uses inconsistent terms or gives repugnant and impossible directions. To deprive the technical words of their appropriate sense, there must be sufficient to satisfy a judicial mind that they were meant by the testator to be used in some other sense, and to show what that sense is." And in *Ralph v. Carrick*, 11 Ch. D. at p. 878, Cotton, L.J., said: "Our duty is in each case to consider the words of the will. I say that, for the purpose of calling attention to the argument that in the absence of any rule of law laid down or established by cases, we are at liberty to construe wills as ordinary intelligent persons would do. There is a fallacy in this. We are bound to have regard to any rules of construction which have been established by the Courts, and subject to that, we are bound to construe the will as trained legal minds would do. . . . We must therefore construe the will as we should construe any other document."

In *Smith v. Butcher*, 10 Ch. D., at p. 114, Jessel,

M.R., says, citing *Leach v. Jay*, 6 Ch. D. 496: "The rule is to adopt the legal and technical meaning of the word unless it is controlled by the context."

"We must attach some meaning to the word ('seised'), and if we are not to take the proper meaning, but some other meaning, what other meaning is it to be? If we are to guess at the meaning which the testatrix attached to the word, where are we to stop? Therefore, it seems to me that the word must either be meaningless, or else must have its proper technical meaning:" Per Bramwell, L. J., *Leach v. Jay*, 9 Ch. D. 45.

It must be remembered that, as the judge before whom the case is being argued is able, and is the only person authorised, to give an authoritative declaration of the law applicable to it, no evidence is admissible as to the meaning of the technical legal words employed other than decisions of other judges. Some few old text-books are also considered as being of authority, and the judges are, in the habit of paying attention to the practice of conveyancers (g). It will be seen, when we come to the discussion of the application of intrinsic evidence to interpretation, that the necessity of attending to the context diminishes the value of prior decisions.

The preceding rules in this chapter are co-extensive with the 2nd, 3rd, 5th, and 6th propositions laid down for the interpretation of wills in Wigram on Extrinsic Evidence, namely:—

Proposition 2. Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other

(g) "The settled practice of conveyancers is to be looked upon as part of the common law:" per James, L.J., *In re Ford and Hill*, 10 Ch. D. at p. 370. "I agree with the Vice-Chancellor that the practice of conveyancers, although it does not decide the point, is not wholly irrelevant" (in construing deeds): per Jessel, M.R., *In re Athill, Athill v. Athill*, 16 Ch. D. 211 (at p. 223). "I put this case on the practice of conveyancers, and after the abuse which I have heard at the bar of the House of Lords and elsewhere upon that subject, I am not sorry to have this opportunity of stating my opinion that great weight should be given to that practice;" per Lord Eldon, C., *Howard v. Ducane*, 1 T. & R. 87.

Evidence as to meaning of technical legal terms.

Statement of the above rules applied to wills by Wigram, V.-C.

Practice of conveyancers.

than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered."

"Proposition 8. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words so interpreted are *insensible with reference to extrinsic circumstances*, a Court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference to these circumstances*, they are capable."

"Proposition 5. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

"The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words."

"Proposition 6. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (*except in certain special cases*) will be void for uncertainty."

Rule 13.—Where the meaning of a word has been defined by an Act of Parliament, no extrinsic evidence is admissible to show that the parties to the deed used it in any other meaning.

Meaning of
word defined
by Act of
Parliament.

Examples.—In *Doe d. Spicer v. Lea*, 11 East, 312, evidence was not admitted to show that by the words “the feast of St. Michael” was meant Old Michaelmas Day, though as was pointed out by the Court intrinsic evidence might have been used for that purpose.

In *The Master and Brethren of St. Cross v. Lord Howard de Walden*, 6 T. R. 388, it was held that the reservation in a lease of so many quarters of corn must mean quarters as defined by the Act of Parliament, and not customary quarters. See 1 Smith’s Leading Cases, 8th ed. 618.

CHAPTER V.

ANCIENT DOCUMENTS.

Contemporaneous Interpretation. Evidence of Usage.

Difficulty produced by lapse of time in obtaining evidence of meanings of words.

THE longer the period that elapses between the time of writing and the time of interpreting a document, the greater is the difficulty in obtaining evidence admissible under Rule 11 as to the meanings of the words employed: and if the document is very ancient, the difficulty may be insuperable. If this be the case, we can sometimes arrive at those meanings with a fair degree of certainty by ascertaining what was the interpretation placed on the document immediately after its execution. The probability is great that at that time there were some persons to whose interest it was to insist upon the document being properly construed, and the fact that a particular interpretation was then placed on it affords a great probability of the correctness of such particular interpretation: and this probability is increased if we find that during a long course of years such interpretation has been acquiesced in.

Contemporaneous interpretation.

Rule 14.—Evidence is admissible as to the interpretation placed upon an ancient document by persons who lived at, or at a time not remote from, the time of the writing of the document.

The interpretation placed upon a document by persons who lived at the time of writing is usually called “contemporaneous” interpretation, and some-

times, though incorrectly, "the interpretation placed upon it by contemporaneous usage:" I say "*incorrectly*," because usage implies duration. Contemporaneous usage.

"*Contemporanea expositio est fortissima in lege*;" 2nd Inst. 186.

"In the construction of ancient grants and deeds, there is no better way of construing them than by usage, and *contemporanea expositio* is the best way to go by;" per Lord Hardwicke, C., *Att.-Gen. v. Parker*, 3 Atk. 577.

Evidence of the acts of the owners of allotments under an Inclosure Act admitted to explain an ambiguous award:—"If the road was improperly set out at first, there were persons enough interested in contesting it, who would not have acquiesced so long;" per Cur., *Wadley v. Bayliss*, 5 Taunt. 752.

"One of the most settled rules of law for the construction of ambiguities in ancient instruments is, that you may resort to contemporaneous usage to ascertain the meaning of the deed; tell me what you have done under such a deed, and I will tell you what that deed means;" per Sugden, C., *Att.-Gen. v. Drummond*, 1 Dr. & War. 868.

"Contemporaneous usage is, indeed, a strong ground for the interpretation of doubtful words or expressions;" per Lord Cottenham, *Drummond v. Att.-Gen.*, 2 H. L. C. 861.

"In construing an ancient instrument, you may look to the usage to see in what sense the words were used at that time;" per Lord Campbell, *ib.* 868.

It will be observed that there is an ambiguity in the word "usage" as employed in these judgments; it may mean either usage under the instrument, or the ordinary usage of society, which at the date of the deed affixed to the words in it a meaning different from that which they now bear; but a comparison of the judgments with those of Sugden, C., in the same case, *ubi supra*, will shew that the word was used in the former meaning. Ambiguity in word "usage."

The manner in which the first trustee of a fund, who was the donor of it, acted in the distribution of it, was held to be strong evidence of intention, and was so treated by the Court in construing the trust deed; *Att.-Gen. v. Brazenose College*, 2 Cl. & Fin. 295 (at p. 317).

Evidence of "the early and contemporaneous application of the funds of the charity itself by the original trustees under the deed" was held by Tindal, C. J., to be admissible to construe the deed; *Shore v. Wilson*, 9 Cl. & Fin. 569.

Contemporanea expositio
applied to
Statutes.

It is perhaps worth noticing that the rule of *contemporanea expositio* is often applied to the interpretation of Statutes; *Sharpley v. Overseers of Mablethorpe*, 8 El. & Bl. 917; *Corporation of Newcastle v. Att.-Gen.*, 12 Cl. & Fin. at p. 419; *R. v. Scot*, 3 T. R. 602; *Sheppard v. Gosnold*, Vaugh. 169; *Montrose Peerage Case*, 1 Macq. H. of L. 401; *Dunbar (Corporation) v. Roxburghe (Duchess of)*, 3 Cl. & Fin. 335; *The Queen v. Archbishop of Canterbury*, 11 Q. B. 581. Following the ordinary rule, the Courts are not influenced in the interpretation of a statute by anything that occurred in Parliament during the passing of the statute; *Gorham v. Bishop of Exeter*, 5 Ex. 667; *Barbat v. Allen*, 7 Ex. 616; *Richards v. McBride*, 8 Q. B. D. 119, 123. And, if the words of the Statute are clear, an interpretation which contradicts them cannot be supported on the ground of usage; *Sheppard v. Gosnold*, Vaugh. 170; *Dunbar (Corporation of) v. Duchess of Roxburghe*, 3 Cl. & F. 335; *The Queen v. Archbishop of Canterbury*, 11 Q. B. 581; *Att.-Gen. v. Rochester (Corporation of)*, 5 De G. M. & G. 797, per Turner, L. J., at 822.

Debates in
Parliament.

Evidence of
usage.

Rule 15.—In interpreting an ancient document, evidence of the usage under it is admissible to explain any obscurity or ambiguity, but not to contradict its clear and unambiguous terms.

"Usage"
explained.

By *usage* is meant the acts habitually done with reference to some particular matter during a long

period; and when such acts have been done by persons purporting to act under a document, they afford the best possible evidence as to the interpretation which those persons placed upon it. Occasional deviations from the regular course will not negative the existence of a consistent usage, for "it follows almost necessarily from the imperfection and irregularity of human nature that a uniform course is not preserved during a long period." A little change is made from time to time through ignorance or other causes; and when by the lapse of years the evidence is lost which would explain such irregularities, we must not too hastily assume that the received construction is therefore incorrect; see *The Queen v. Archdall*, 8 Ad. & El. 288.

"Ancient charters, whether they be before time of memory, or after, ought to be construed as the law was taken when the charter was made, and according to ancient allowance. . . . And when any claimed before the Justices in Eyre any franchises by an ancient charter, though it had express words for the franchises claimed; or if the words were general, and a continual possession pleaded of the franchises claimed, or if the claim was by old and obscure words, and the party in pleading, expounding them to the Court, and averring continual possession according to that exposition; the entry was ever *Inquiratur super possessionem et usum*, &c., which I have observed in divers records of those Eyres, agreeable to that old rule, *Optimus interpret rerum usus*; 2nd Inst. 282.

"In the case of a grant, no usage, however long, can countervail the clear words of the instrument, for what is done under usurpation cannot constitute a legal usage: but, it is equally clear, that when a grant of remote antiquity contains general words, the best exposition of such a grant is long usage under it. Unless, therefore,

the usage of forty years ago can be proved to have originated in usurpation, it is evidence whence usage anterior to that time may be presumed: and such a length of modern usage, connected with the ancient usage, affords the strongest exposition of the meaning of the original grant;" per Dallas, C. J., *Chad v. Tilsed*, 2 Brod. & Bing. 466; S. C. 5 Moore, 185.

"However general the words of the ancient deeds may be they are to be construed by evidence of the manner in which the thing has always been possessed and used;" per Ellenborough, C. J., *Weld v. Hornby*, 7 East, 199.

"Suppose the words of the charter are doubtful, the usage in this case is of great force; not that usage can overturn the clear words of a charter: but if they are doubtful, the usage under the charter will tend to explain the meaning of them; especially in a case like this, where, before the charter, the corporation consisted of an indefinite number of burgesses by prescription, and where the charter itself added no new members, but only incorporated the old ones;" per Lord Mansfield, C. J., *Rex v. Varlo*, 1 Cowp. 250.

"There can be no doubt that to ascertain the meaning of an ancient grant describing lands as 'the territory of Claudeboy,' parol evidence of acts of ownership is admissible, as showing what that territory included;" per Walsh, M.R., *Re Belfast Dock Act*, Ir. Rep. 1 Eq. 141.

Even evidence of modern usage is admissible:

Modern
Usage (a).

"I have no doubt that all ancient documents, where a question arises as to what passed by a particular grant, can be explained by modern usage;" per Parke, B., *Beaufort (Duke of) v. Swansea (Mayor of)*, 8 Ex. 425; cited with approval by Malins, V. C., *Corporation of Hastings v. Ivall*, L. R. 19 Eq. 581.

"It is not to be disputed that when the necessity of the case requires it, evidence of more recent usage and

(a) See Grant on Corporations, p. 28, and as to usage under a modern statute, see *Trustees of Clyde Navigation v. Laird*, 8 App. Ca. pp. 670, 673.

custom may be adduced for the purpose of explaining old or obsolete, or even imperfect expressions to be found in ancient documents ;" per Bacon, V. C., *Earl de la Warr v. Miles*, 17 Ch. D. 573.

"Usage continued during living memory, when there is nothing to the contrary, and when the question is one of prescription, may no doubt justify the presumption of a similar usage from time immemorial;" per Lord Selborne, C., *Neill v. Devonshire (Duke of)*, 8 App. Ca. 156.

In *Healy v. Thorne*, Ir. R. 4 C. L. 495, evidence of usage for the last eighty years was admitted to construe a grant by King James I.

The rule does not apply where the construction of the deed is clear without it :

Rule not applicable where deed is clear without it.

"If there is a deed which says, according to its true construction, one thing, you cannot say that the deed means something else, merely because the parties have gone on for a long time so understanding it;" per Cranworth, C., *Sadlier v. Biggs*, 4 H. L. C. 458.

"The necessity" for introducing evidence of usage "must be apparent—the ambiguity must be found to be existing;" per Bacon, V. C., *Earl de la Warr v. Miles*, 17 Ch. D. 573; see *Re Belfast Dock Act*, Ir. R. 1 Eq. 141.

Examples of the application of the rule to the explanation of:—

Parcels.

Ancient admissions to copyholds by the description of **Parcels**.
"tres acras prati," followed by modern admissions to *"three acres of meadow,"* held on evidence of long usage to pass the *prima tonsura* or fore-crop only; *Stammers v. Dixon*, 7 East, 200.

An ancient grant of wreck was held on evidence of long usage to have passed the exclusive right to the soil of a small bay; *Chad v. Tilsed*, 2 Brod. & Bing. 408; S. C. 5 Moore, 185: of manor and wreck to have passed the sea-shore between high and low-water mark; *Calmady v.*

Rowe, 6 C. B. 861; of the Priory of H., and also four islands to the said priory belonging: to wit, the island called S., containing three acres, &c., with large general words granting wreck of the sea, flotsam, jetsam, &c., to have passed the sea-shore between high and low water-mark; *Healy v. Thorne*, Ir. R. 4 C. L. 495; see also *Hamilton v. Att.-Gen.*, 5 L. R. Ir. 555; *Brew v. Haren*, Ir. R. 9 C. L. 29; 11 C. L. 198.

The mountain of S. containing 1,700 acres, held by evidence of usage to have passed by an old demise of "the village of S. and part of W. & T. containing by estimation 148 acres;" *Waterpark v. Fennell*, 7 H. L. C. 650.

Ancient grants of Manors held, on evidence of usage which was of so long standing that it might be presumed to be contemporaneous with the grant itself, to include the sea-shore between high and low-water mark; *Beaufort (Duke of) v. Swansea (Mayor, &c. of)*, 3 Ex. 418; *Att.-Gen. v. Jones*, 2 H. & C. 347; S. C. 33 L. J. Ex. 249. And see Hall on the Sea Shore (2nd ed.), p. 15.

Evidence of user admitted to shew that the soil passed by a surrender of "*pasturam bosci et subbosci de Haydwood*;" *Doe d. Kinglake v. Beviss*, 7 C. B. 456; S. C. 18 L. J. C. P. 128: by a grant of a "Warren of Conies"; *Robinson v. Duleep Singh*, 11 Ch. D. 798. And see Browne on Usages and Customs, p. 82.

Charitable Trusts.

Charitable
Trusts.

A power of nominating a schoolmaster given to "the vicar and his successors and the churchwardens for the time being," held on evidence of usage to be well exercised by the vicar and a majority of the churchwardens; *Withnell v. Gartham*, 6 T. R. 388. See also, as to right of election, *The Queen v. Dulwich College*, 17 Q. B. 600.

"When a school is instituted as a free grammar-school without more, it is a school to teach the elements of the learned languages: yet . . . if there was an ancient free grammar-school, and if at all times something more had

been taught in it than merely the elements of the learned languages, that usage might ingraft upon the institution a right to have a construction put upon the endowment different from what would have been put upon it if a different usage had obtained ;" per Lord Eldon, C., *Att.-Gen. v. Hartley*, 2 Ja. & W. 378—379.

See also *Att.-Gen. v. Brazenose Coll.*, 2 Cl. & Fin. 295, and *Shore v. Wilson*, 9 Cl. & Fin. 569, *supra* ; *Att.-Gen. v. Boston (Mayor of)*, 1 De Gex & Sm. 519 ; *Att.-Gen. v. Mayor of Bristol*, 2 Ja. & W. 321 ; *Att.-Gen. v. Murdoch*, 1 De G. M. & G. 86 ; *In re Campden Charities*, 18 Ch. D. 310. *

And see Lewin on Trusts (7th ed.), p. 485 ; Tudor on Charitable Trusts, 243 foll. Interpretation by usage is recognized in the case of charitable trusts by the Acts 7 & 8 Vict. c. 45, s. 2, and 23 & 24 Vict. c. 134, s. 5.

Charters.

Where the election of a mayor was by charter to be as Charters follows, viz. : " That the mayor, aldermen, and burgesses, or the greater part of them, should from time to time have a power of assembling themselves, or the greater part of them, at — and should there continue till they or the greater part of them then there assembled should choose one of the aldermen to be mayor ;" held on evidence of usage that an election of a mayor by a majority of the electors assembled was good ; *Rex v. Varlo*, 1 Cowp. 248.

In *Blankley v. Winstanley*, 3 T. R. 279, the limits of the jurisdiction of magistrates ; in *Gape v. Henley*, 8 T. R. 288 (n), the question whether the presentation to a rectory belonged to the mayor and aldermen, or to the mayor, aldermen, and burgesses ; and in *Bradley v. Newcastle-on-Tyne*, 2 El. & Bl. 427, who were liable to pay *primage* ; were determined by evidence of usage. See also *R. v. Osbourne*, 4 East, 327 ; *Bailiff, &c., of Tewkesbury v. Bricknell*, 2 Taunt. 120 ; *R. v. Chester*, 1 Mau. & Sel. 101 ; *Mayor of London v. Long*, 1 Camp. 22 ; *R. v.*

Bellringer, 4 T. R. 810; *The King v. Davie*, 6 Ad. & El. 374; see also *Grant on Corporations*, 27.

Miscellaneous.

Miscellaneous. A covenant for renewal in a lease has been held, on evidence of usage, to amount to a covenant for perpetual renewal, in *Sadlier v. Biggs*, 4 H. L. C. 435; and *Cooke v. Booth*, 2 Cowp. 819 (see the comments on this case in *Baynham v. Guy's Hospital*, 3 Ves. 295).

A grant of tithes from the Crown (*Lucton School v. Scarlett*, 2 Y. & J. 330, 363, 365); a deed of trust of a rectory, which gave the right of election of a curate to the parishioners and inhabitants (*Att.-Gen. v. Parker*, 3 Atk. 576); and an ambiguous inclosure award (*Wadley v. Bayliss*, 5 Taunt. 752); have all been explained by evidence of usage.

Where some persons have interests adverse to

As already stated, the force of usage as evidence of interpretation is much increased when it has been the interest of some of the parties to dispute the correctness of the established interpretation. "It appears to me," says Lord Cranworth, "that there are the most satisfactory circumstances tending to shew what the rights of the parties are: there are, long enjoyment, the same dealing with the property for a very great period, during the whole of which it was for the interest of one party to resist that which, nevertheless, he from time to time performed;" *Sadlier v. Biggs*, 4 H. L. C. 455.

Usage admissible only for explaining ambiguous words.

It is sometimes said that evidence of usage is admissible only for the purpose of explaining ambiguous words; *Withnell v. Gartham*, 6 T. R. 398; *Att.-Gen. v. Fishmongers' Co.*, 5 My. & Cr. 16; *Dunbar (Corporation of) v. Duchess of Roxburghe*, 3 Cl. & Fin. 335. All that is meant by this dictum is that we can only place on the words of the document some of the meanings that they properly bear, or in other words that we cannot place on the words a meaning that they cannot bear, or that we cannot put such an interpretation on the document as will contradict its express words; *Att.-Gen. v. Clapham*,

4 De G. M. & G. 591; *Drummond v. Att.-Gen. for Ireland*, 2 H. L. C. 837; *Att.-Gen. v. St. John's College*, 2 De G. J. & S. 621; *Att.-Gen. v. St. Cross Hospital*, 17 Beav. 495; *Att.-Gen. v. Ewelme Hospital*, 17 Beav. 366; *Dunbar (Corporation of) v. Duchess of Roxburghe*, 3 Cl. & Fin. 335; *King v. Salway*, 9 B. & C. 424; *Earl de la Warr v. Miles*, 17 Ch. D. 678; *Neill v. Devonshire (Duke of)*, 8 App. Ca. at p. 156; and cf. *Re Campden Charities*, 18 Ch. D. 310.

If, on the other hand, evidence of usage were admissible for the purpose of affixing to the words in the document meanings that they do not properly bear, we should arrive at the absurd result that the interpretation placed on the same document might vary from time to time, or that a person who acted under a mistake as to his rights by virtue of an instrument would be for ever bound to act in the same manner. See *Baynham v. Guy's Hospital*, 3 Ves. 295; *Eaton v. Lyon*, 3 Ves. 694; *Iggulden v. May*, 9 Ves. 325; S. C. 7 East, 237; S. C. 2 Bos. & Pull. N. R. 449; *Clifton v. Walmesley*, 5 T. R. 564; Sugden, V. & P. 169.

CHAPTER VI.

INTRINSIC EVIDENCE.

*Deed to be construed so as to be consistent with itself.
Omissions : Transpositions : Repugnancies : False
Grammar : Incorrect spelling.*

Primary
meaning ex-
cluded by
context.

Rule 16.—Where the primary meaning of a word is excluded by the context, *i.e.*, by intrinsic evidence, we must affix to that word such of the meanings that it properly bears as will enable us to collect uniform and consistent intentions from every part of the deed (*a*).

“Every deed ought to be construed according to the intention of the parties, and the intents ought to be adjudged of the several parts of the deed, as a general issue out of the evidence, and intent ought to be picked out of every part, and not out of one word only ;” per Hobert, C. J., *Trenchard v. Hoskins*, Winch, 98.

It is a rule that the construction of a deed “be made upon the entire deed, and that one part of it doth help to expound another, and that every word (if it may be) may take effect and none be rejected, and that all the parts do agree together and there be no discordance therein. *Ex antecedentibus & consequentibus est optima interpretatio :*

(*a*) *Parkhurst v. Smith*, Willes, 332 ; *Solly v. Forbes*, 4 Moore, 448 ; *Lansdowne v. Lansdowne*, 2 Bligh, 88 ; *Monypenny v. Monypenny*, 3 De G. & J. 588 ; *Hext v. Gill*, L. R. 7 Ch. 705 ; *Taylor v. Corporation of St. Helens*, 6 Ch. D. 270 ; *Laird v. Briggs*, 19 Ch. D. 34 ; *Tucker v. Linger*, 21 Ch. D. 36. And see cases cited in *Cholmondeley v. Clinton*, 2 J. & W. 11, 12 ; *ibid.* at p. 89 ; and 1 P. Wms. 457 ; but see 2 J. & W. 84 ; 2 Mer. 343. See observations, 2 Sm. L. C. (8th ed.) 540.

for *turpis est pars quae cum suo toto non convenit. Maledicta expositio quae corrumpit textum* ;” Shep. Touch. 87.

“ Every part of the deed ought to be compared with the other and one entire sense ought to be made thereof ;” *Throckmerton v. Tracy*, 1 Plow. 161.

“ The word, *appertaining* to the messuage, shall be taken in the sense of *usually occupied* with the messuage or *lying* to the messuage, for when *appertaining* is placed with the said other words it cannot have its proper signification . . . and therefore it shall have such signification as was intended between the parties, or else it shall be void, which it must not be by any means, for it is commonly used in the sense of *occupied with* or *lying to*, and being placed with the said other words it cannot be taken in any other sense, nor can it have any other meaning than is agreeable with law, and forasmuch as it is commonly used in that sense it is the office of judges to take and expound the words which common people use to express their meaning, according to their meaning, and therefore it shall be here taken not according to the true definition of it, because that does not stand with the matter, but in such sense as the party intended it ;” *Hill v. Grange*, 1 Plow. 170.

“ *Qui haeret in litera haeret in cortice*, especially in the case of trusts, which are to be ruled and governed according to the intent of the parties, where such intent is consistent with the rules of law ; and the Court will, from the general frame of a testament or settlement, collect the intent, contrary to the express words of a particular clause ;” per Henley, L. K., *Earl of Northumberland v. Earl of Egremont*, 1 Ed. 446 ; citing *Coryton v. Helyar*, 2 Cox, 840, where an absolute term of ninety-nine years limited to J. C., amongst other limitations of real estate in a will, was cut down on the construction of the whole will to a term determinable on the death of J. C.

“ It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus* ; every part of it may be brought into action in order to

collect from the whole one uniform and consistent sense, if that may be done ;" per Lord Ellenborough, C. J., *Barton v. Fitzgerald*, 15 East, 540.

"In the construction of all instruments it is the duty of the Court not to confine itself to the force of a particular expression, but to collect the intention from the whole instrument taken together. But a Court is not authorized to deviate from the force of a particular expression, unless it finds, in other parts of the instrument, expressions which manifest that the author of the instrument could not have the intention which the literal force of a particular expression would impute to him. However capricious may be the intention which is clearly and unequivocally expressed, every Court is bound by it, unless it be plainly controlled by other parts of the instrument ;" per Leach, V. C., *Hume v. Rundell*, 2 S. & S. 177.

Rule 17.—Omitted words may be supplied, repugnant words may be rejected, words may be transposed, and false grammar or incorrect spelling may be disregarded, if the intention of the parties sufficiently appear from the context.

"*Si obligation ad incongrue Latyn uncore c'est bon ;*" Bro. Abr., Obligation, 71.

"Neither is it necessary, that the English or Latin, whereby a deed is made, be true and congruous ; for false and incongruous Latin or English seldom, or never hurteth a deed ; for the rules are, *Falsa orthographia non vitiat chartam. Falsa grammatica non vitiat concessionem ;*" Shep. Touch. 55.

"It is a rule of law, *mala grammatica non vitiat chartam*, neither false Latin nor false English will make a deed void when the intent of the parties doth plainly appear. It is therefore held that two negatives do not make an affirmative when the apparent intent is contrary, And it is another rule of law *falsa orthographia non vitiat concessionem ;*" Shep. Touch. 87.

" *Falsa grammatica non vitiat concessionem : item, ille numerus et sensus abbreviationum accipiendus est ut concessio non sit inanis.* And therefore if the King grants *tot' ill' maner' de D. et C.* if it is but one manor in truth, then these abbreviations of *tot' ill' maner'* shall be taken in the singular number *totum illud manerium* : and if they are in truth two distinct manors, then these abbreviations shall be taken in the plural number *tota illa maneria*, or otherwise the grant will be void So in the consequence of a fine, false Latin or incongruity shall not hurt the fine ;" *The Earl of Shrewsbury's Case*, 9 Rep. 47b.

" It is not rare, say they, in our books that words shall be transposed and marshalled so as the feoffment or grant may take effect. As if a man in the month of February make a lease for years reserving a yearly rent payable at the feasts of St. Michael the Archangel and the Annunciation of our Lady, during the term, the law in this case of reservation shall make transposition of the feasts, viz., at the feasts of the Annunciation and of St. Michael, that the rent may be paid yearly during the term. And so it is in case of a grant of an annuity ;" Co. Litt. 217b. The cases referred by Coke are *Hill v. Grange*, 1 Plow. 171, and *The Abbot of Osenay's Case*, 10 E. 3, 43, Pl. 4.

" Words shall be transposed to support the intent of the parties ;" Comyn's Digest, art. " Paroles ", A. 21.

Examples.—The word " pounds ", which had been omitted in the obligation of a bond, was supplied : Lord Tenterden, C. J., says, " The obligatory part of the bond purports that the obligor is to become bound for 7700. No species of money is mentioned. It must have been intended that he should become bound for some species of money. The question is, Whether from the other parts of the instrument we can collect what was the species of

Words
supplied (b).

(b). See also cases cited 2 Sm. L. C. (8th ed.) 542 ; and also *Gwyn v. Nash, Campl. Co.*, L. R. 3 Ex. 215 ; *Flight v. Lake*, 2 Bing. N. C. 72 ; *Wall v. Bright*, 1 Dr. & Walsh, 1 ; Sugd. Law P., 92 ; *Wright v. Dickson*, 1 Dow, 141.

Words
supplied.

money which the party intended to bind himself to pay ? ”

Coles v. Hulme, 8 B. & C. 568.

The name of the grantor which was omitted in the operative part of the deed was supplied from the context in *Lord Say and Seal's Case*, 10 Mod. 468 ; S. C. 4 Br. P. C. 78 ; *Trethewy v. Ellesdon*, 2 Vent. 141, and *Dart v. Clayton*, 4 N. R. 221 ; see *Mill v. Hill*, 3 H. L. C. 828.

A name omitted from the premises was supplied from the habendum in *Bustard v. Coulter*, Cro. El. 902 ; *Butler v. Dodton*, Cary's Rep. in Ch. 122. See also Co. Lit. 7a.

A name wrongly stated in the premises was corrected from the habendum in *Spyve v. Topham*, 3 East, 115. Perhaps it may be considered that in this case the words in the premises were rejected for the repugnancy.

By a post-nuptial settlement reciting an intention to make further provision for the wife and the children of the marriage, certain sums of stock were settled on trust for the wife for life and after her death “ in trust for all and every the child and children of the marriage who being a son or sons have or hath already attained or shall hereafter live to attain the age of twenty-one years,” as tenants in common and their respective executors “ and if there shall be but one such child the whole shall be in trust for such one or only child and *his* or *her* executors and administrators.” The maintenance clause spoke of “ *his* or *her* maintenance, &c, until *his* or *her* share should be vested, or *he* or *she* previously die.” Held, that the words “ or being a daughter or daughters shall attain twenty-one,” must be inserted in the trusts for children. *Re Daniel's Settlement Trusts*, 1 Ch. D. 375.

A father, P., by deed of 22nd February, 1836, appointed £5000 to his daughter O. for her separate use, with power to appoint, &c. On the day following the daughter appointed £1000 to her husband and £4000 to trustees upon trusts for the benefit of herself, her husband and children. P. also made appointments of £5000 to each of his daughters E. and H. On 22 November, 1842, P. by deed poll reciting that he had appointed £5000 to each of E. and H., “ and

also the sum of £5000 in favour of O.," appointed £5000 to M. for life, remainder as to one-third to E., as to another third to H., and the remaining third to "O. the wife of R. and her children upon the trusts and subject to the same provisions as are hereinbefore declared of and concerning the said sum of £5000 hereinbefore appointed unto or for the benefit of the said O., wife of R., or as near thereto as the nature of circumstances will admit." Held that the deed must be construed as if the words "stated or mentioned to have been" had been inserted after the words "as are hereinbefore," and as if the words "and her children" had been omitted; *Hanbury v. Tyrell*, 21 Beav. 322.

See words supplied from the context, in marriage articles, *Kentish v. Newman*, 1 P. W. 234; *Targus v. Puget*, 2 Ves. 194; in a will, *Greenwood v. Greenwood*, 5 Ch. D. 954; *Re Redfern*, 6 Ch. D. 138; *Spalding v. Spalding*, Cro. Car. 185.

A lease for one year was produced with many stipulations, most of which were wholly inapplicable to such a tenancy; on the face of the lease it appeared to have originally contained words creating a tenancy from year to year, but these had been struck out: it was held that all the terms inapplicable to a tenancy for a single year must be considered as expunged or as only applicable in case the tenancy should continue; *Strickland v. Maxwell*, 2 Cr. & M. 539.

A separation deed provided that all outgoings in respect of certain estates should be paid by J., the husband, up to a certain day, and that afterwards they should be paid by M. the wife, "and that J. shall be indemnified therefrom *and from all the present debts and liabilities of J.*" Held that as the words in italics made the clause inconsistent

(c) Many examples of this will be found, *post*, Chapter VIII., INACCURACIES, and Chapter XII., PARCELS. Bac. Abr. tit. Leases and Terms for Years (L.) 3, vol. 4, p. 836 (7th ed.), cited arg. *Morton v. Woods*, L. R. 4 Q. B. 299; 2 Sm. L. C. (8th ed.), 541, 542; *Fearne*, Cont. Rem. 252; *Bradley v. Peicoto*, 3 Ves. 324; Tud. L. C. Real P., 962; *Gwyn v. North Canal Co.*, L. R. 8 Ex. 215; *Seagood v. Hone*, Cro. Car. 366.

with itself, they ought to be disregarded; *Wilson v. Wilson*, 15 Sim. 487.

Condition of a Bond "To deliver 85,000 tiles to the value of £144 at 15s. and 6d. per 1000." It will be seen that 185,000 tiles would have amounted to £144. The mistake was corrected on the ground that the sum of money and not the number of tiles was the thing material; *Holmes v. Ivy*, 2 Show. 15.

Transposition
of clauses (d).

Conveyance by marriage settlement to A., the intended husband, his heirs and assigns, and in case A. should die leaving one or more son or sons on the body of his intended wife to be begotten, the elder of such sons and the heirs male of his body being always preferred to take place before the younger . . . with full liberty to the said A. "to make such reasonable provision as he should think fit for *such* younger child or children," and in case the said A. should die leaving no son and that there should be one or more daughters, then to such daughter or daughters if more than one, on their attaining their respective ages of twenty-one years, their heirs and assigns, share and share alike. Held, that as the intention of the settlement was evidently to provide for all the children, as well daughters as sons, the Court would effect that intention by transposing the clause creating the power and that containing the limitation to the daughters, whereby the words "such younger child or children" would include both sons and daughters; *Fenton v. Fenton*, 1 Dr. & Wal. 66.

Where in a marriage settlement a term for securing younger children's portions was placed subsequent to the estates tail of the sons, it was helped in equity. But *query*, was this a case of *extrinsic* evidence? *Uvedale v. Halfpenny*, 2 P. W. 150.

False
Grammar (r).

A Bond is made in these words; "Know all Men that

(d) *Parkhurst v. Smith*, Willes, 382; *Gwyn v. Neath, &c., Canal Co.*, 1. R. 3 Ex. 214; *Atto v. Hemmings*, 2 Bulstr. 282. "The law will rather invert the words than pervert the sense;" Bacon's Law Tracts, Case of Revocation of Uses, cited 2 Sm. L. C. (8th ed.), 541.

(e) 2 Sm. L. C. (8th ed.) 540, citing *Chapman v. Dalton*, Plowd. 289; 1 Inst. 225a; *Butler v. Wigg*, 1 Will. Saund. 64,

I Philip Goole do stand bound " (not said to whom) " in the sum of £16, and is to be paid to the said John Garnes the elder's executors ; for which payment to be made I do bind me, my heirs and executors " (but not said to whom). The condition, after long and senseless recitals, was : " If therefore Philip Goole shall pay to John Garnes the elder's executors within one year after his death, the bond shall be void." Held, that either the words " John Garnes the elder's executors," should be disjoined and be read " John Garnes the elder his executor " and to be taken " John Garnes the elder and his executors," or that the words " the elder's executors " should be wholly rejected as void, and the words be read " to be paid to John Garnes " only ; *Langdon v. Goole*, 3 Lev. 21.

Debt on a Bond conditioned to pay £7 by 2s. a week till the £7 were paid, and if he failed of the payment of the 2s. at any of the days wherein it ought to be paid, the obligation to be void or else to remain in full force. The obligor omitted to make the payment of the 2s. on one of the days on which it ought to be paid ; held, that the condition might be read distributively, by referring particulars to particulars, viz., that if he paid the £7 the obligation should be void : but if he failed of paying the 2s. at any of the days, it should remain in force ; *Vernon v. Alsop*, 1 Lev. 77.

Incorrect spelling disregarded : " Octagenta," " Septem-
genta," " Sewtene Pounds," cited *James Osborn's Case*, 10 Rep. 133a ; " quadrans," *Cromwell v. Grunsden*, Salk. 462 ; S. C. 1 Ld. Ray. 335 ; 5 Mod. 278 ; " Tenerie and Obligarie," *Dodson v. Kayes*, Yelv. 193 ; " nobules " for " nobilibus," *Matthew v. Purchins*, Cro. Jac. 203 ; " threty-two ponds," *Hulbert v. Long*, Cro. Jac. 607 ; " Joaem," without any dash over it, for " Johannem," " quinginta," *Downs v. Hathwait*, Cro. Car. 418 ; " Terdecem," *Hopehill v. Searle*, Cro. Car. 386 ; " Septuagintis " for " Septingentis," *Walter v. Pigot*, Moore, 645 ; see also Cro. El. 896 ; " Octogessim," Moore, 864 ; see other cases collected 2 Rolle, Ab. p. 146, *et seq. tit.* " Obligation."

Incorrect
spelling dis-
regarded.

Cases where the badly spelt word was held to avoid the deed: "teneri in terengentate liberis," *Hills v. Cooper*, Cro. Jac. 608; "Octigent," *Fitzhughes' Case*, Hob. 19; "quimquagent," *Parry v. Dale*, Yelv. 95.

See as to the effect of bad spelling, whereby it is doubtful what is meant, *Fielder v. Tovy*, Sty. 241, 257.

CHAPTER VII.

MISCELLANEOUS GENERAL RULES.

The expression of that which is implied has no effect, except that it may alter the construction of a subsequent clause: Express provisions exclude implication: Repugnant clauses: Words to be taken against the person using them, except in the case of the King: Election by grantee.

Rule 18.—The expression of a clause that the law implies has no effect. *Expressio eorum quæ tacite insunt nihil operatur. Expressa non prosunt quæ non expressa proderunt.* Co. Lit. 205a; 2nd Inst. 365; 4 Rep. 73b. Expression of implied words.

Examples.—“If a gift in tail be made to a man and to the heirs of his body, and if he die without heirs of his body, that then the donor and his heirs shall re-enter, this is a void condition; for when the issues fail, the estate determineth by the express limitation, and consequently the adding of the condition to defeat that which is determined by the limitation of the estate is void, and in that case the wife of the donee shall be endowed;” Co. Lit. 224b.

Reservation of rent in a lease for years to the lessor during his life and his assigns; *held*, that the reservation to the assigns had no effect, because the addition of assigns is implied by law; *Sury v. Cole*, Latch, 44; S. C. (sub nom. *Sury v. Brown*) *ib.* 99, 255: see *Wotton & Edwin's Case*, cited 1 Vent. 162.

“If lands be letten to two for term of their lives, *et eorum alterius diutius viventi*, and one of them granteth

his part to a stranger, whereby the jointure is severed, and dyeth, here shall be no survivour, but the lessor shall enter into the moiety, and the survivour shall have no advantage of these words *et eorum alterius diutius viventi*, for two causes. First, for that the jointure is severed. Secondly, for that those words are no more than the Common Law would have implied without them." Co. Lit. 191a.

"The clause of distress (in a lease) is no otherwise to be extended than as the grantor gives it; and therefore if the clause were, 'if the rent be behind, being demanded at another place besides the land, or of his person, then he may distrain,' clearly then he could not distrain without such a demand made first, for there the demand is other than the law requires. But where the clause is no more but 'if the rent be behind being lawfully demanded, then he may distrain,' it is no more than the law speaks; and therefore the distress implying a demand and distress, one before another, by operation of law satisfies it;" *Browne v. Dunnery*, Hob. 208.

Ejectment on a proviso for re-entry contained in a lease on the rent being in arrear for 21 days, *being lawfully demanded*. The Act 4 Geo. 2, c. 28, provides that when half a year's rent is in arrear, and the lessor has a right by law to enter for non-payment, he may without a formal demand or entry sue in ejectment. *Held*, there being five quarters in arrear, that it was not necessary to make a demand of the rent on the premises before bringing the ejectment. Dampier, J., said: "The right to re-enter grows out of the stipulation of the parties. A demand is necessary as a consequence at law, and there was the same necessity for a demand before the statute whether the lease contained the words *lawfully demanded* or not. Therefore the maxim applies;" *Expressio, &c.*; *Doe d. Scholefield v. Alexander*, 2 M. & S. 525.

Feoffment reserving rent to the feoffor, "and if it happen the aforesaid rent to be behind in part or in all, that then it shall be lawful for the feoffor and his heirs to enter." It is not necessary to insert the power of re-entry

because the feoffor and his heirs can do so by force of the reservation. "*Quæ dubitationis causa tollendæ inscruntur, communem legem non lædunt. Et expressio, &c.*" Litt. ss. 330, 331; Co. Lit. 205a.

Where a mortgage-deed expressly secured the mortgagees' expenses and interest: *Doe d. Scruton v. Snaithe*, 8 Bing. 146; fines for renewals if paid by the mortgagee: *Wroughton v. Turtle*, 11 M. & W. 561; the expenses incurred by the mortgagee in keeping up a policy of life insurance comprised in the security: *Lawrence v. Boston*, 7 Ex. 28; the payment by the mortgagor of all taxes on the mortgaged property: *Doe d. Merceron v. Bragg*, 8 Ad. & El. 620; it was *held*, that as in each of these cases the moneys expended by the mortgagee for these purposes would have been charged by the law without any express words, the rule applied, and that consequently the deed did not require any *ad valorem* stamp in respect of the moneys so expended.

The rule is applied where the words state only part of that which the law implies, so that they appear at first sight to be restrictive.

Unnecessary words apparently restrictive.

Examples.—Mountague asked this question:—A man makes a lease for term of years by indenture, and the lessor covenants and grants to the lessee, "that he shall have thorns for hedges growing upon the land, *by the assignment of the bailiff* of the lessor, and necessary fuel to burn in his house." First, whether the lessee can take thorns *without the assignment* of the bailiff, or not? Secondly, if by the copulative (*and necessary fuel*) that shall refer to the *assignment of the bailiff*, or not? For the first, it seemed to Baldwin and Fitzherbert, that the lessee, by virtue of his lease, may well cut thorns without assignment by the order of the law; for by our books the law is, that a termor shall have loppings and shrowdings of trees for necessary fuel; and then to insert these words, "that he shall have fuel *by the assignment of his bailiff*" is void, for what the law gives him by implication in the lease, that

he may take without assignment. For, if I lease to one, two acres of meadow, and that it shall be lawful for the lessee to cut the grass *at the assignment of the lessor*, notwithstanding these words, the lessee may cut the grass. But if the other covenant on his part be in a negative, "that he will not take thorns without the assignment of the lessor," now that is a good covenant, and if he do contrary to that, action of covenant well lies. Or if it were a condition which is a negative in law, as, "proviso that he shall not take thorns without, &c.," now if he do that, clearly the lessor may enter, &c. But in the other case, it is a grant on the part of the lessor in the affirmative. Wherefore, &c.: *Shelley è contra*; for when a man takes a lease out of the order of the law, *viz.*, by special words and terms, he shall have it as if the lessor spoke the words, and no otherwise. Wherefore here he hath accepted the lease by such words, "that he shall have thorns by the assignment of the bailiff;" that is as much as to say, he shall not have them without the assignment. Wherefore, &c. And as to the other point, it seemed to him that this copulative (*and*) should make the fuel pass by assignment, &c.; Dyer, 19b, pl. 115.

Feoffment by D. of certain closes reserving unto D. and his heirs all the coals, with liberty for D. his heirs and assigns at all times thereafter, "during the time that D. and his heirs should continue owners of F.," to sink pits, &c. *Held*, that D. could get coals under the reservation in fee, and that the express liberty was not restrictive of that which would be implied to get the coals; *Cardigan v. Armitage*, 2 B. & C. 197.

S. bargains and sells to G. all the trees growing in and on a manor, and covenants that G. might within five years sell and carry away the trees, &c. *Held*, that G. might cut and carry away the trees after the five years, as the power to fell them implied by the grant cannot be restrained by an express power that the grantee had before; *Stukeley v. Butler*, Hob. 168, see p. 178.

But the expression of unnecessary words may alter the construction of a subsequent clause.

Unnecessary words may alter construction of subsequent clause.

“ Though the law say, that when a man grants lands, he grants the underwoods inclusively, and-so when he grants his house, he grants all the several rooms in the house, yet 33 & 34 Eliz., in the King’s Bench, between *Kenisham & Redding*, the case was, that the Queen leased the Parsonage of Greenwich, with all the lands and underwoods expressly thereunto belonging, *exceptis omnibus grossis arboribus boscis et maceremiis* (a). The opinion of the Court was that the exception as to underwoods was void. But they held that the exception was only to be extended to great woods. So is the case 9 Eliz. 265, of a lease of a house and shops, excepting the shops, which proves that the rule ‘*expressio eorum*,’ &c., is to be understood having reference to itself only, and not having relation to other clauses.” *Stukeley v. Butler*, Hob. see p. 170.

Rule 19.—*Designatio unius est exclusio alterius.* An express provision excludes implication.
Co. Lit. 210a. *Semper expressum facit cessare tacitum.*
Co. Lit. 183b. ; 210a.

“ Where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications: the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument; ” per Lord Denman, C. J., *Aspden v. Austin*, 5 Q. B. 684.

“ If authority is given expressly, though by affirmative words, upon a defined condition, the expression of that condition excludes the doing of the act authorized under other circumstances than those so defined; ” per Willes, J., *North Stafford Steel, &c. Co. v. Ward*, L. R. 3 Ex. 177.

Examples, *Parcels* :—Conveyance of an iron foundry *Parcels*.

(a) *Boscus* comprises both timber and underwood; *maceremium* means timber fit for building. See Co. Lit. 4b; Du Cange.

and two dwelling-houses and the appurtenances, together with the fixtures in the dwelling-houses : *Held*, that the fixtures in the foundry did not pass ; *Hare v. Horton*, 5 B. & Ad. 715.

Where the property is conveyed both by a general and specific description (*Griffiths v. Penson*, 1 N. R. 880, S. C. 9 Jur. N. S. 385 ; *Lord North v. Bishop of Ely*, cited 1 Buls. 100 ; *Doe d. Meyrick v. Meyrick*, 2 Cr. & J. 228), only that particularly described will pass ; see *post*, Chapter XII., PARCELS.

Habendum.

Habendum.—"If a lease be made to two, *habendum* the one moiety to the one, and the other moiety to the other, the *habendum* doth make them tenants in common ; and so one part of the deed doth explain the other, and no repugnancy between them, *et semper expressum facit cessare tacitum* ;" Co. Lit. 183b.

Covenant.

Covenant.—A trustee mortgaged lands and covenanted for payment out of the monies which should come to his hands as trustee : *Held*, that he was not personally liable ; *Mathew v. Blackmore*, 1 H. & N. 762. The Court said (p. 771-772) : "The question is, whether a contract by parol can be implied for the repayment where there is an express covenant under seal relative to it. The rule of law, as well as of reason and good sense, is, '*expressum facit cessare tacitum*,' and where there is an express covenant that the defendant shall, out of the trust funds which shall come to his hands and the personal estate of his testator (which was not included in the mortgage security) pay the sum advanced, we think it impossible to conclude that at the same time he made himself absolutely liable for the payment of it *simpliciter* ; and at all events to do so would be to create a contract by implication different from, and much more onerous than that entered into by the express words used, and this against a trustee having no personal interest whatever in the transaction."

The covenants implied by the word *demise* are restricted by an express qualified covenant for quiet enjoyment : *Noke's Case*, 4 Rep. 80b ; *Merill v. Frame*, 4 Taunt. 329 ; *Line v. Stephenson*, 5 Bing. N. C. 188.

Policy.—A policy of life assurance was entered into, **Policy.** founded on a written declaration of the assured, which was agreed to be the basis of the contract between the parties, and which contained a proviso that “if any statement in the declaration (which declaration should be considered as much a part of that policy as if the same had been actually set forth therein) was untrue, or if, &c., then the policy should be void.” The proposal and declaration contained the usual particulars, and proceeded as follows: “I do hereby declare that the above-written particulars are correct and true throughout, and I do hereby agree that this proposal and declaration shall be the basis of the contract between me and the office, and if it shall hereafter appear that any fraudulent concealment or designedly untrue statement be contained therein,” then the policy to be void: *Held*, that the policy was not avoided by an untrue statement in the declaration unless designedly untrue; *Fowkes v. Manchester & London Life Assurance and Loan Association*, 3 B. & S. 917.

Rule 20.—Where there are two repugnant clauses ^{Repug-} in a deed, the first shall be received and the second ^{nancies.} rejected, unless there is a special reason to the contrary; *Shep. Touch.* 88.

“When there are two clauses in a deed, of which the later is contradictory to the former, there the former shall stand; as in 2 Ed. 2, *feoffments and faits*, 24 (a). 4 H. 6, 22, of a gift in frank-marriage, rendering rent, the reservation is void;” per Nicholas, B., *Cotter v. Merrick*, Hard. 94; see to the same effect, per Lord Mansfield, C.J., *Doe d. Leicester v. Biggs*, 2 Taunt. 113; 2 Black. Com. 381, citing the case in Hard.; see also per Kindersley, V.-C., *Re Webber*, 17 Sim. 222. In *Sury's Case*, Latch, 264, it is said: “When there is repugnance between the words, the law prefers the first; 2 Ed. 2, *feoffments*, 94.

(a) The reference is wrong.

So that if a lease is made reserving annually during the term £10 to the lessor for twenty years, this is a good reservation for the whole term. So in 5 Rep 19, a lease to two, *habendum* jointly and severally, they are joint tenants."

Examples.—A lessee for 100 years made a lease to Thomas Seaman for forty years if he should so long live ; and afterwards he leased the same land to John his son, *habendum* after the term of Thomas for twenty-three years, *to be counted from the date of these presents* : *Held*, that the lease to John began, not from the date, but from the end of the term of Thomas, because when by the first words of the limitation it is a good lease to begin after the term of Thomas, it shall not be made void by any subsequent words ; *Seaman's Case*, Godb. 166.

Surrender of copyholds by J. R. to the use of A. and B. "this surrender not to stand and be in full force until after the death of J. R." The latter words were rejected for the repugnancy ; *Seagood v. Hone*, Cro. Car. 366.

Conveyance to A. her heirs and assigns, *habendum* to A. and her assigns during the life of G. ; G. was A.'s heir-at-law : *Held*, that on A.'s death G. took as special occupant, and that the land did not pass to A.'s executors by the words in the *habendum* ; *Doe d. Timmis v. Steele*, 4 Q. B. 663 ; see *post*, Chapter XIV., HABENDUM.

"It being then impossible to affix a meaning to the words," sterling lawful money of Ireland, "taken altogether, I must deal with them according to the rule of law as to construing a deed ; which is, if you find that the first words have a clear meaning, but those that follow are inconsistent with them, to reject the latter. And it appears to me that there is no possible method of dealing with this set of words other than by saying that the words "one yearly rent-charge or sum of £1000 sterling lawful money," must be taken to stand by themselves, and the words "of Ireland" must be rejected ;" per Shadwell, V. C., *Cope v. Cope*, 15 Sim. 126.

The rule is one which is only applied in the last

resort, if a Judge can find nothing else to assist him in determining the question.

It is a mere rule of thumb, as Jessel, M. R. calls the converse rule applied to wills : see *Re Bywater, Bywater v. Clarke*, 18 Ch. D. pp. 19-20, and per James, L. J., *ib.* at p. 24.

It appears that in most of the cases, the true reason for rejecting the latter words, was that they were inconsistent with the general scope of the deed. In *Cother v. Merrick*, the question was whether a lease by a tenant in tail, where the reservation was to his heirs and assigns, was good within the statute of 32 H. 8 to bind the issue in tail, who was not the heir of the lessor ; and the case was really decided upon the fact that the word "heirs" might be held to mean "heirs in tail." In the case of frank marriage the reason for the decision appears to be that a gift in frank marriage cannot carry rent for four generations ; and in *Doe d. Leicester v. Biggs*, it was merely a dictum. In *Cope v. Cope*, the construction really turned upon the whole tenor of the deed.

This view of the nature of the rule, is supported by the following remarks of Wilde, C. J., in delivering judgment in *Walker v. Giles*, 6 C. B. 702 :—"As the different parts of the deed are inconsistent with each other, the question is, to which part effect ought to be given. There is no doubt, that, applying the approved rules of construction to this instrument, effect ought to be given to that part which is calculated to carry into effect the real intention, and that part which would defeat it should be rejected ; and so construing the deed, the Court is of opinion that the latter part, importing a demise, cannot have that effect, without defeating the intention of the parties."

Rule 21.—The words in a deed shall be construed most strongly against him who uses them, if so doing works no wrong, unless a different construction appears from the context to be necessary.

Words to be taken against the person using them.

This rule is often misunderstood: it does not mean that the words are to be twisted out of their proper meanings, but only that where the words may properly bear two meanings, and where, after we have applied evidence, whether extrinsic or intrinsic, admissible under the foregoing rules, we are still unable to determine in which of those meanings they were used, we must take them in the meaning most disadvantageous to the person who uses them, unless the adoption of that meaning would work wrong.

The reason for the rule given in Cruise, Dig. Tit. 32, Ch. 20, s. 13, is "That the principle of self-interest will make men sufficiently careful not to prejudice themselves by using words of too extensive a meaning, and all manner of deceit is hereby avoided in deeds: for men would always affect ambiguous expressions, if they were afterwards at liberty to put their own construction on them;" see to the same effect, Shep. Touch. 87.

The reader will find this rule laid down repeatedly in works of authority and in judicial decisions (*b*), though it is perhaps right to point out, that some at least of the decisions which purport to rest on the rule, have but little to do with it, and that the existence of the rule is denied by Jessel, M. R.; *Taylor v. Corporation of St. Helen's*, 6 Ch. D. 264, at p. 270; see *post*, p. 97.

"It is a maxim in law, that every man's grant shall be taken by construction of law most forcible against himself. *Quælibet concessio fortissimè contra donatorem interpretanda est*, which is so to be understood, that no wrong be thereby done; for it is another maxim in law, *Quod legis constructio non facit injuriam*. And therefore if tenant for life maketh a lease generally, this shall be taken by

(*b*) *Fowkes v. Manchester & London Assurance Association*, 3 B. & S. 925; *Taylor v. Liverpool & Great Western Steam Co.*, L. R. 9 Q. B. 549; per Selborne, C., in *Neill v. Devonshire*, 8 App. Ca. 149; *Johnson v. Edgware, &c., Railway Company*, 35 Bea. at p. 484,

construction of law an estate for his own life that made the lease ; for if it should be a lease for the life of the lessee, it should be a wrong to him in the reversion. And so it is if tenant in tail make a lease generally, the law shall contrive this to be such a lease as he may lawfully make, and that is for term of his own life ; for if it should be for the life of the lessee, it should be a discontinuance, and consequently the state which should pass by construction of law should work a wrong ;" Co. Litt. 183 a, 183b ; cf. Co. Litt. 42a.

"A release in deed, which is the act of the party, shall be taken most strongly against himself ;" Co. Litt. 264b.

"The principle of construction which has been so strenuously contended for, *viz.*, that the terms of a grant are to be construed as favourably as possible for the grantee, the Court is not disposed to controvert ;" per Wilde, C. J., *Re Stroud*, 8 C. B. 529.

"It is a rule of construction, that where there is a grant and an exception out of it, the words of the exception are to be considered as the words of the grantor, and are to be construed in favour of the grantee ;" per Holroyd, J., *Bullen v. Denning*, 5 B. & C. 850. Construction of exception.

Examples.—"A., tenant in fee simple, makes a lease of lands to B., to have and to hold to B. for term of life, without mentioning for whose life it shall be : it shall be deemed for term of the life of the lessee, for it shall be taken most strongly against the lessor, and as hath been said an estate for a man's own life is higher than for the life of another ;" Co. Litt. 42a. Construction in favour of grantee.

Lease for thirty-one years, and four years after the beginning of the term a new lease made to another person, as follows: "Know that I the aforesaid, thirty-one years being completed, have demised and granted all the premises, &c., *habendum* from the day of the making of these presents, the term aforesaid being first finished until the end of the term of thirty-one years thence next ensuing ;" *held*, that the term should begin after the termination of the term of thirty-one years, as otherwise the lessee would only

have a lease for four years, and every grant shall be expounded most strongly against the grantor; Dy. 261b, pl. 28.

Lessee for 100 years made a lease for forty years to T. S., if he should so long live; and afterwards he demised it to John, "*habendum* after the term of forty years, for the term of twenty-three years to be computed from the date of these presents;" *held*, that the lease to John should commence from the expiration of the lease to T. S., on the ground that, if the limitation be not certain when the term shall begin, it shall be taken most beneficial for the lessee; *Seaman's Case*, Godb. 166.

A man makes a lease of Blackacre to A. for ten years, and of Whiteacre to B. for twenty years; and afterwards by indenture, reciting the former leases, demises both Blackacre and Whiteacre to another for forty years, to begin after the end and determination of the said several leases made to A. and B. Afterwards the former lease of Blackacre ends during the currency of the lease of Whiteacre; it was *held*, that the *habendum* in the latter lease was to be taken *respectivé* and that the new term for forty years in Blackacre began immediately on the determination of the term of ten years in it granted by the former lease, on the ground that "every deed shall be taken more strongly against the grantor, and more beneficially for the grantee, and it is more beneficial for the lessee to have the lease in Blackacre to begin presently after the expiration of the first lease made thereof, than to tarry till the lease of Whiteacre be ended. If I release unto you all actions which I have against you and another, in this case, notwithstanding the joint words, all actions which I have against you alone are released, for it shall be most beneficially for him to whom the release is made, and most strongly against him who makes it;" *Justice Windham's Case*, 5 Rep. 7b.

In *Doe d. Davies & Williams v. Williams*, H. Bl. 25, where a conveyance was made by lease and release of the Clock Mills, "and all lands and meadows to the said

message or mill belonging, or used, occupied, and enjoyed, or deemed, taken, or accepted as part thereof," the rule was applied to show that three acres of leasehold land, which had for thirty-seven years been held with the Clock Mills, were intended to pass.

In a lease for twenty-one years, there was a covenant that the lessee should have the land for twenty-one years more after the expiration of the said term, and "so from twenty-one years to twenty-one years, until ninety-nine years past thence next ensuing shall be complete and ended." The question arose whether the first twenty-one years were included in the ninety-nine; and Dolben, J., said: "the words 'from thence next ensuing,' may be referred to the beginning of the first term, or to the end of it;" whereupon Scroggs, C. J., said: "therefore it standing so indifferent, we ought to construe it most strongly against the grantor," and the Court decided that the first twenty-one years were not to be computed in the ninety-nine; *Manchester College v. Trafford*, 2 Show. 31; S. C. 2 Lev. 241.

The rule has been applied to the construction of an habendum: *Anon.*, Dyer, 261b, pl. 28; of covenants for title: *Barton v. Fitzgerald*, 15 East, 530; but see *Nind v. Marshall*, 1 Brod. & Bing. 319; of covenants by a lessee; *Webb v. Plummer*, 2 B. & Ald. 746 (*per* Holroyd, J., at 751); *Barrett v. Bedford*, 8 T. R. 602; of a proviso in a lease; *Doe d. Abdy v. Sterens*, 3 B. & Ad. 299; of an agreement for tenancy: *Ile Stroud*, 8. C. B. 502; of the words "for seven, fourteen, or twenty-one years," in an agreement for a lease: *Dann v. Spurrier*, 3 Bos. & Pul. 399; in a lease: *Doe d. Webb v. Dixon*, 9 East, 15.

Where the grantor takes an interest under his own grant, the deed will be construed as if a stranger were the grantor; *Vincent v. Spicer*, 22 Beav. 380.

The rule has been objected to by Jessel, M. R., who says (*Taylor v. Corporation of St. Helens*, 6 Ch. D. 270): "I do not see how, according to the now established rules of construction, as settled by the House of Lords, in the well-known case of *Grey v. Pearson*, 6 H. L. C. 61,

Objections to rule.

followed by *Roddy v. Fitzgerald*, 6 H. L. C. 828, and *Abbott v. Middleton*, 7 H. L. C. 68; that maxim can be considered as having any force at the present day. The rule is to find out the meaning of the instrument according to the ordinary and proper rules of construction. If we can thus find out its meaning, we do not want the maxim. If, on the other hand, we cannot find out its meaning, then the instrument is void for uncertainty, and in that case it may be said that the instrument is construed in favour of the grantor, for the grant is annulled."

Who is the person using the words?

In *Shep. Touch.* 86, and 2 Bl. Comm. 380, a distinction is drawn between an indenture and a deed-poll to the effect, that as the latter is executed by the grantor alone, and the words are his only, it should therefore be taken most strongly against him; but that as an indenture is executed by both parties, the words are to be considered those of them both: see *Scorell & Cavel's Case*, 1 Leon. 318. It seems, however, that the rule requires to be supplemented by the explanation that as regards indentures, the law will consider the words to be spoken by him who can properly speak them (c).

"First, it is to be considered that the lease and also the covenant and grant to pay the sum, is made by indenture, and the words in an indenture are the words of both parties; and although they are spoken as the words of one party only, yet they are not his words alone, for there is the assent of the other party to each other's words; and therefore, when they are written, they shall be taken in such manner as the intent of the parties may be supposed to be. And they shall not be taken most strongly against one and beneficially for another, as the words of a deed-poll shall, for there the words shall be taken most strongly against the grantor, and most available to the grantee. But it is not so in a deed indented, because the law makes each party privy to the speech of the other; and therefore we ought not to make such construction of words in an indenture as in a deed-poll. But

if an indenture contains matter of substance, the law will make such reference thereof as is most fit and reasonable, and will say that the words are spoken by him who could most properly speak them ; and therefore, where the plaintiff here has covenanted and granted to render and pay the said sum for the lands, the words are in fact the words of the lessee, but in construction of law they shall be taken as the words of reservation of the lessors, inasmuch as they have the sense and effect of a reservation. For words of covenant and grant to render and pay such a sum for the land have the effect of reserving or paying rent for the land, and so the law will take them to be spoken by the lessors. As if a man make a feoffment in fee by deed indented rendering such rent, there it ought to be considered that it cannot be reserved as a rent may upon an estate for years, for life, or in tail, because the reversion is not in the feoffor, and yet the feoffor shall have it as a rent granted by the feoffee. And by the same reason that the law there takes the words of the feoffor as the words of the feoffee, by the like reason in our case it will take the words of the lessee as the words of the lessor, for they serve most properly that way. And if the deed indented had specified that the plaintiff should have the land, and should pay 20s. yearly, that would be a rent, for the law refers the words in any writing indented to be spoken by him that can best speak them ;" *per* Staunford and Walsh, *arguendo*; *Browning v. Beston*, Plowd. 134.

Exception. — The King's grant is taken most ^{The king's grant.} strongly in favour of the King, and against the grantee ; Plowd. 243.

Examples.—A grant by the Crown of "lands" and "mines" does not pass ores royal or mines royal ; *contra*, if the King grant all mines which he has in the lands of A., and has a royal mine there, for the King cannot be deceived in his grant ; *Reg. v. Northumberland, the Case of Mines*, Plowd. 310.

Where the King, being seised of two manors, A. and B., granted "*totum illud maner' de A. & B.*," or "*totum illud maner' de A. cum B.*," it was held that neither manor passed; and where the King granted all the demesne lands of a manor, it was held that copyholds parcel of the manor, did not pass; 1 Rep. 46a, 46b.

If the King grants "*the manor of D., which he hath by the attainder of A.*," and in truth he hath it not by his attainder, the grant is void; 1 Rep. 52a. See also *The King v. The Bishop of Rochester & Sir F. Clerke*, 1 Mod. 195, 2 Mod. 1; S. C. Freeman, Rep. in K. B. 172, 178; *Lee v. Browne*, Freeman, Rep. in K. B. 207; *The King v. Capper*, 5 Pri. 217; *Att.-Gen. v. Marquis of Downshire*, 5 Pri. 269; *Green's Case*, 6 Rep. 29a; *Auditor Curle's Case*, 11 Rep. 2b; *Mason v. Chambers*, Cro. Jac. 34; and see the cases cited in Cruise, Dig. vol. 5, Tit. xxxiv.; Chitty on the Prerogatives of the Crown, 391.

Election of
grantee (*d*).

Rule 22.—"When a deed may enure to divers purposes, he to whom the deed is made shall have election which way to take it, and he may take it that way as shall be most for his advantage;" Shep. Touch. 83.

Examples.—"If a deed of grant be made by the words '*dedi et concessi*,' this in law may amount to a grant, feoffment, gift, lease, release, confirmation, or surrender, and it is in the choice of the grantee to plead or use it in the one way or the other;" Shep. Touch. 83; Co. Lit. 301. b.

Sir R. H., seised of a manor, part in demesne, part in copyhold, part in leasehold for years in consideration of a sum of money by deed, "demised, granted, bargained, and sold" it for a term of years to commence from

(*d*) See *ante*, p. 40. See also the notes to *Chester v. Willan*, 2 Wms. Saund. 96a.

his death. *Held*, that the grantees might elect to take by demise at common law, or by bargain and sale under the statute; *Heyward's Case*, 2 Rep. 35a; see to the same effect, *Darrell v. Gunter*, Sir W. Jones, 206, where the words were "demise, grant, and to farm let."

The King having rent of a manor, of which A. and his wife were jointly seised, for valuable consideration, "gave and granted, remitted, released, and renounced" the rent to the husband and his heirs. *Held*, that the husband might use it as a grant of the rent or as a release of it, at his election; Dy. 312b, pl. 16.

CHAPTER VIII.

AMBIGUITIES. EQUIVOCATIONS. INACCURACIES.

*Ambiguities and inaccuracies defined and distinguished :
Patent ambiguities : Ambiguity determined by election : Equivocations : Direct evidence of intention : Effect of general joined to particular statement : Inaccuracies.*

MUCH confusion exists, even in judicial decisions, between ambiguities of the different classes, and between ambiguities and inaccurate descriptions.

Ambiguities. There are two kinds of ambiguity :—

Patent ambiguity.

First, where the ambiguity arises from the fact that the parties have expressed inconsistent intentions on the face of the deed.

An ambiguity of this class is apparent to any person perusing the deed, even if he be unacquainted with the circumstances of the parties, and is called a “ patent ambiguity.”

Latent ambiguity or equivocation.

Second, where no ambiguity is apparent to a person perusing the deed, until, on obtaining evidence of the circumstances of the parties, it is discovered that there are several persons or things or classes of persons or things, to each of which a name or description contained in the deed seems to be equally applicable.

An ambiguity of this class is called a "latent ambiguity" or an "equivocation."

A gift of "my gold watch" to "the son of A.," appears unambiguous, and it is not till it appears from extrinsic evidence that A. has two sons, or that the speaker has two gold watches, that the equivocation becomes manifest.

It may be remarked that most words may bear more than one meaning, and as no man can know all the possible meanings of every word in the language, it may happen that while the parties to a deed think that they have expressed their intentions in an unambiguous manner, the language appears to be ambiguous to a person who is aware that some of the words are capable of more than one meaning.

Ambiguities arising solely from the fact that the words are capable of more than one meaning (a class which, it will be observed, includes equivocations) are sometimes called "latent ambiguities," while at other times the phrase is, restricted to equivocations, as above defined. To avoid confusion I shall always apply the term "equivocation" to a description which seems to be equally applicable to more than one person or thing, or class of persons or things, where only one is intended.

Ambiguities arising from words bearing more than one meaning.

An inaccurate description is one that does not exactly fit any person or thing, or class of persons or things.

Inaccurate description.

As to the application of the phrase "latent ambiguities" to inaccuracies, see *post*, p. 114.

It should perhaps be remarked that a description may be equivocal without being inaccurate, and may be inaccurate without being equivocal. If A. has two houses in London the phrase "A.'s house in London" is equivocal, but it is not inaccurate. The description fits each house, though it does not distinguish between them. On the other hand, if A.'s only house in London is lease-

Inaccurate distinguished from ambiguous description.

hold, the description, "A.'s freehold house in London," is inaccurate, but not equivocal. See examples in Chapter XII., PARCELS.

Patent Ambiguities.

Patent
ambiguities.

Where a *patent* ambiguity exists, the writer appears to be halting between two intentions; *e.g.*, "I give my dog to my nephew John or Thomas;" a limitation "to one of the sons of A." In each of these cases the writer has given a correct description of the object of his bounty, but he has not stated clearly whether John or Thomas, or which of the sons of A. is to be that object. Either extrinsic or intrinsic evidence, admissible under the preceding rules (see *ante*, chap. iv., and chap. vii.), might show that John and Thomas denoted the same person, or that A. had only one son, and that that fact was known to the parties; (see Wigram, *Extr. Ev.* p. 80, pl. 79); in which case the ambiguity would disappear; but if this is not the case, if the ambiguity remains after the application of such evidence, the writer has expressed no intentions that we can ascertain. Similar remarks would apply to the case where the ambiguity occurs in the subject-matter of the gift. These considerations give rise to the following Rule:—

Deed con-
taining patent
ambiguity void
for un-
certainty.

Rule 23.—Where after the application of extrinsic evidence to determine the primary meanings of the words, and of intrinsic evidence to determine in what secondary meanings, if any, they are employed, a patent ambiguity remains as to the person or thing intended, or as to what is to be done, we cannot ascertain the intentions of the parties, or, as the rule is commonly expressed, the deed or clause is void for uncertainty.

"If one grant to one of the children of J. S., and J. S. hath more than one, and he do not describe which

he doth intend, this grant is void for incertainty ;" Shep. Touch. 251.

"*Ambiguitas patens*" (i.e., an ambiguity apparent on the deed or instrument) is never holpen by averment (a) ; and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law ; for that were to make all deeds hollow, and subject to averments, and so in effect, that to pass without deed, which the law appointeth shall not pass but by deed. . . . It holdeth generally that all ambiguity of words by matter within the deed, and not out of the deed, shall be holpen by construction, or in some cases by election, but never by averment, but rather shall make the deed void for uncertainty ;" Bac. Elem. Rule 23.

Lease dated 10th October, habendum "from the 20th day of November, for 5 years ;" *Held* void for the uncertainty what November is meant ; *Anon.* 1 Mod. 180. See *Anon.* 1 Leon. 227, *post*, p. 106. Agreement for sale of land ; "the vendor reserves the necessary land for making a railway through the estate to P." *Held* void for the uncertainty ; *Pearce v. Watts*, L. R. 20 Eq. 492 (cf. *Chattock v. Muller*, 8 Ch. D. 177). Proviso in mining lease void for uncertainty, *Mundy v. Duke of Rutland*, 23 Ch. D. 81.

Exception.—In some cases an ambiguity in the subject-matter, or in the estate granted may be determined by the election of one of the parties.

Ambiguity in subject-matter determined by election (b).

"Of everything uncertain, which is given or granted, election remains to him to whose benefit the grant or gift was made, to make the same certain unless in special cases ;" Vin. Ab. Grants, H. 5.

"If I give you one of my horses, although that be

(a) "Averment" meant the offer of a defendant to make good his plea in certain cases, Co. Lit. 362b. Here it is used in the meaning of offering to give direct evidence of intention. See *post*, p. 108.

(b) See Rule 22, p. 100.

uncertain, yet by your election that may be made a good gift ;” *Mervyn v. Lyds*, Dy. 91a.

“ If one grant to me a rent or a robe ; twenty shillings or forty shillings ; or common of pasture or rent ; in the disjunctive, which is at first very incertain ; yet this grant may become good ; for if I make my election, or he pay the rent, or perform the grant in either part, the grant is now become good. . . . So it is when a man hath six horses in his stable, and he doth grant me one of his horses, but doth not say which of them ; in this case I may choose which I will have ; and in these cases, when I have made my election, and not before, the grant is good. And if in these cases, the grantee doth not make his election during his life (and also the life of the grantor ; *Bac. Abr. Grant*, H. 3) : it seems the grant will never be good.” *Shep. Touch.* 251.

Fine, feoffment, and recovery of land, part of a manor, to a certain annual value, *held good* by election of *cestui que use* : *Calthrop's Case*, Moore, 101, pl. 247.

Where a grant is general, as the moiety of a yardland or 120 acres in a certain waste, without certainty in what part of the waste the grantee shall have the land, or the special name of the land, or how it is bounded, and without any certain description of it, the grant may be made good by the election of the grantee, if the grantor be a common person, but not if he be the Crown, in which case the grant is altogether void: *Hungerford's Case*, 1 Leon. 30 ; *Brand v. Todd*, Noy, 29 ; and see Bacon, *Elem. Rule* 23. As to grants by the Crown, see *Doe d. Derine v. Wilson*, 10 Moo. P. C. 502.

If a mortgage debt is made payable to the mortgagee, his heirs, or executors, and he die before the day appointed for payment, the mortgagor may, if he pay on that day, pay either to the heir or the executor ; *Co. Litt.* 210a.

Lease for years to begin at the feast of our Lady, without saying at which feast, the lessee may determine the beginning of the term at his election ; *Anon.*, 1 Leon. 227 ; see *Anon.* 1 Mod. 180, *ante*, p. 105. Agreement by an incumbent to grant a lease at a future time of his glebe, “ except

37 acres thereof," which were not specified. *Held*, that the contract was not void, as the right of selecting belonged to the lessor, he having the first act to do; *Jenkins v. Green*, 27 Beav. 487.

Agreement for lease for seven, fourteen, or twenty-one years, or lease habendum for seven, fourteen, or twenty-one years, is not void, but gives an option to the lessee to determine the lease at the end of the first seven or fourteen years; *Dann v. Spurrier*, 3 Bos. & P. 399, 442; *Doe d. Webb v. Dixon*, 9 East. 15; *Powell v. Smith*, L. R. 14 Eq. 85.

See other examples, 1 Bro. Ab. 725, "*Election*;" Vin. "*Election*." C.

Equivocations.

An equivocation is not discovered till the person perusing the deed finds by extrinsic evidence, admissible under Rule 11, as to the primary meanings of the words employed that the description is equally applicable to more than one person or thing, or class of persons or things.

Either extrinsic or intrinsic evidence, admissible under the preceding Rules 11 and 16, and the subsidiary rules, may be adduced for the purpose of determining the meaning of the words and clearing up the *primâ facie* equivocation.

If it should happen that such evidence is insufficient* to resolve the equivocation, we are at liberty to resort to evidence, both intrinsic and extrinsic, for that purpose, but the extrinsic evidence to which we now resort differs in its nature from that already discussed in Chapter IV.

Rule 24.—Intrinsic evidence may be employed for the purpose of determining which person or thing or class of persons or things described by an equivocal description is intended.

Intrinsic evidence to resolve equivocation.

It will be observed that the purpose for which intrinsic evidence is employed under this rule differs from that for which it is admitted under Rule 16. Under Rule 16 intrinsic evidence is employed for the purpose of excluding the primary meaning of the word, while by Rule 24 it is admissible in order to discriminate between two primary meanings which appear to be equally probable. The phrase "John the nephew of A.," is equivocal when A. has two nephews each called John. Intrinsic evidence to show that the word "nephew" was used in the secondary sense of "great-nephew," would be admissible under Rule 16, while intrinsic evidence to show which of the two nephews called John was meant would be admissible under the rule now being considered.

Direct
evidence of
intention.

Evidence of what was passing in the minds of the parties at the time of executing the deed is not admissible for the purpose of determining the primary meaning of a word under Rule 11, but evidence of that nature is admissible to determine in which of their several primary meanings the words in an equivocation were employed.

Rule 25.—When after all the extrinsic and intrinsic evidence admissible under the preceding rules (11 and 16, and the subsidiary rules, and under rule 24) has been exhausted, a name or description still remains equivocal—*then, and not till then*—extrinsic evidence of what was passing in the minds of the parties to the deed at the time of execution is admissible for the purpose of determining which of the several persons or things or classes of persons or things described by the equivocation was intended, and for no other purpose whatsoever.

Evidence of the nature mentioned in this rule may be called "direct evidence of intention": it

may be defined as "Evidence to prove intention itself as an independent fact."

Direct evidence of intention is entirely different in its nature from evidence used to determine the primary meaning of a word. It will be remembered that (ante, Ch. IV. pp. 47, 48) evidence of the latter nature is adduced for any of the purposes following, viz. : (1), To show the meaning *usually* affixed to the words at the time of execution of the deed by persons of the class to which the parties belonged ; or (2), the meaning in which the words must have been used by the parties having regard to their circumstances at the time of execution ; or (3), the meaning which it can be conclusively shown that the parties were in the habit of affixing to the words. On the other hand, direct evidence of intention is evidence as to which of several persons or things, or classes of persons or things was *on the special occasion of framing the deed* intended by a description, which, when interpreted with the aid of extrinsic and intrinsic evidence admissible under Rules 11 and 16, appears to be equally applicable to each of them.

Where Judges or text writers speak of applying "verbal" or "parol" evidence to the explanation of ambiguities or inaccuracies, they generally mean direct evidence of intention ; but since the phrase "parol evidence" may mean evidence as to the primary meanings of the word, there is a certain amount of confusion in the *dicta* of the Judges and authors, against which the reader must be on his guard. For instance, *dicta* will be found to the effect that "parol evidence" is not admissible to clear up a patent ambiguity or an inaccuracy, where all that is meant is that direct evidence of intention is not admissible for that purpose ; and it is not intended to deny the admissibility of evidence to ascertain the primary meanings of the words employed.

It will be observed that this rule is not, as may at first sight appear, an exception to rule I. (*supra*, p. 1) against the admission of evidence to contradict, vary, or add to

Verbal or
parol evidence.

Direct evidence
of intention is
in support of
the express
words.

the terms of the deed. "In the case of equivocation, the general intent includes both the special, and *therefore stands with the words.*" (Bacon, Elem. Rule 23). The person or thing intended is correctly described, though the description applies also to another person or thing; while in cases falling under Rule I. the contention, which is contradicted by that Rule, is that the deed does not completely or correctly express the intention of the parties, and that therefore the expressed intention ought to be disregarded or supplemented on verbal evidence of unexpressed intentions.

Examples : "If a man has two sons both baptized by the name of *John*, and conceiving that the elder (who had been long absent), is dead, devises his land by his will in writing to his son *John* generally, and in truth the elder is living; in this case the younger son may in pleading or in evidence allege the devise to him; and if it be denied, he may produce witnesses to prove his father's intent, that he thought the other to be dead" (*i.e.*, that the primary meaning of *John*, was *John* the younger), "or that he at the time of the will made, named his son *John* the younger" (*i.e.*, may adduce direct evidence of intention that *John* the younger was meant), "and the writer left out the addition of the younger; for in 47 E. 316b, the case was: *Robert Peynel* had issue two sons baptized by the name of *William*, and levied a fine to *Sir John Fanningbridges* and others *come ceo, &c.*, who granted and rendered to *Robert* and *William* his son generally; and after the death of *Robert*, *William* the younger son brought a *scire facias* against the heir of *William* the elder; and the younger by the rule of the Court averred that the fine was levied to make him heir, *prius, &c.*, and upon that, issue was taken. And no inconvenience can rise if an averment in such case be taken in case of a devise by will, for he who sees such will, whereby land is devised to his son *John*, cannot be deceived by any secret invisible averment; for when he sees the devise to his son *John*, he ought, at his peril to enquire which *John* the testator intended, which may be easily known by him who wrote the will, and others who were

privy to his intent ; and if no direct proof can be made of his intent, then the devise is void for the uncertainty as the render also would be in the said case of the fine as to *William* ;” *Lord Cheney’s Case*, 5 Rep. 68 b.

“ If a man levies a fine of the manor of Soure or of the manor of Dirtleby . . . and in truth there is the manor of North Soure and South Soure, of Great Dirtleby and Little Dirtleby, in this case issue may be taken *dehors*, which manor the conusor intended to pass, for that is matter of fact not apparent in the fine, whereof the Judge cannot take conusance ; but it stands well with the fine, and shall be tried by the jury, and therewith agree 12 H. VII. 7 ; 26 H. VIII. 6 a ;” *Altham’s Case*, 8 Rep. 155 b.

To the same effect, see *Keilw.* 49 (pl. 6), *Plow.* 85 a ; *Davenant v. Raster*, 6 Mod. 235. The reader is referred to the important case of *Doe d. Gord v. Needs*, 2 M. and W. 129 (discussed in *Wigram*, *Extr. Ev.* pl. 182, 4th Edit., p. 148), for an instance of the same principle applied to the interpretation of a will.

The Rule as to latent ambiguities, *i.e.*, equivocations, is stated with reference to wills in *Wigram on Extrinsic Evidence* (p. 13, pl. VII., and see p. 101 *et seq.*), in the following terms :—

Rules as given
by Wigram,
V.-C.

“ *Proposition VII.*—Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator’s meaning — Courts of Law, in certain special cases, admit extrinsic evidence of intention to make certain the person or thing intended, where the description in the will is insufficient for the purpose.”

“ These cases may be thus defined :—Where the object of a testator’s bounty, or the subject of disposition (*i.e.*, the person or thing intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator.”

Evidence of intention not admissible to explain patent ambiguity.

Rule 26.—No direct evidence of intention is admissible to explain a patent ambiguity.

This rule follows from the principles above laid down, but it appears convenient to state it expressly, so as to contrast patent ambiguities with equivocations: See *ante*, p. 102.

If a man by deed gives goods to one of the sons of J. S., who has divers sons, here he shall not aver which son he intended, for by judgment in law upon this deed, this gift is void for the uncertainty, which cannot be supplied by averment—Vide 11 Ed. IV. 2a. . . . Where the words are in the limitation of the estate to two *et hæredibus*, that is apparent in the fine, and by judgment of law these words *et hæredibus* are uncertain and void " (because it does not appear whose heirs are meant), "and no averment *dehors* can make that good, which upon consideration of the deed is apparent to be void;" *Altham's Case*, 8 Rep. 155b. To understand this it should be remembered that a gift to one man *et hæredibus* omitting *suis*, followed by livery, gave him a fee simple. Plowd. 28a.; see Co. Litt. 8b. See also Shep. Touch. 251.

An action was brought on a bill of exchange expressed in figures to be drawn for a different sum from that expressed in words. Evidence of the intention of the parties as to the sum for which it was drawn was rejected, Tindal, C.J., saying—"This is a case of *ambiguitas patens*, and, according to the rules of law, evidence to explain such an ambiguity is not admissible. Where there is doubt on the face of the instrument the law admits no extrinsic evidence to explain it;" *Saunderson v. Piper*, 5 Bing. N. C. 481. Here by "extrinsic evidence," the Judge meant "direct evidence of intention."

The rule as to the admissibility of evidence to explain ambiguities, including equivocations, is commonly stated as follows;—"In a written instrument, if there be a *patent ambiguity*, it never is allowed to be explained by verbal evidence, though a *latent ambiguity* is so;" Smith

Incorrect statement of rules as to admission of evidence to explain ambiguity.

on Contracts, 6th ed., p. 45. See also Smith's Law of Property, 4th ed., pp. 896, 990 ; Chitty, Contr. 10th ed., pp. 101, 102. Many *dicta* of Judges and even judicial decisions will be found to the same effect.

The reader, who has rightly apprehended the rules already laid down in this treatise, will observe that the Rule as thus stated is incorrect, for the following reasons :—

(1) In all cases of ambiguity, whether patent or latent, extrinsic evidence is admissible to ascertain the primary meanings of the words, and until such evidence is adduced it is impossible to say whether the instrument is ambiguous or not; see Wigr. Ex. Ev. 179, pl. 203. (2) Direct evidence of intention is admissible for the purpose of explaining an equivocation, but not a patent ambiguity. It is to be observed also that by the phrase "latent ambiguity" in the foregoing quotation is meant an equivocation; but the books often use the phrase in a wider sense, including any doubt raised by the application of extrinsic evidence, whether it be what is more properly called an inaccuracy, or a mere *primâ facie* case of ambiguity, which is ultimately solved by the further application of ordinary evidence.

Effect of a General joined to a Particular Statement.

There is an inaccuracy of language which must be distinguished from an ambiguity, namely, where the writer in one place makes a general, and in another place a specific statement of his intentions. If a man says, "I am going to France," and in another place says, "I am going to Paris"; although the statement resembles a patent ambiguity in form, there is no ambiguity; all that the writer has done, is in one place to state his intention with vagueness, and in another place with accuracy. Hence the following—

Rule 27.—Where a deed contains both a general, General and also particular statement. vague, or indefinite, and also an exact or particular statement of intention, the latter must prevail.

Examples of the application of this rule will be found scattered about in this treatise (see *e.g.*, Chap. XII., PARCELS).

Inaccuracies.

It is hardly necessary to remind the reader that it is impossible to perceive that a description is inaccurate until we have applied extrinsic evidence to ascertain the primary meanings of the words, as well as such intrinsic evidence, if any, as is afforded by the deed under consideration. This is why inaccuracies are sometimes incorrectly spoken of as "*latent ambiguities*," when that expression is used in a wide sense, and not as synonymous with equivocations.

The discussion of the more common forms of inaccuracies in the different clauses of deeds, will be found in this book under the appropriate headings. In this place I shall only discuss the general rules.

Where
neither whole
description nor
any part
applies

Rule 28.—If neither the description as a whole, nor any part of it, renders it certain what object was intended, we can affix no meaning to the words employed, and the deed or clause is void for the uncertainty.

Examples.—"If a man letteth lands to A. for life, the remainder to B. in tail, the remainder to C. *in forma prædicta*, this remainder is void for the uncertainty;" Co. Lit. 20b.

Limitation to "A. et B. et hæredibus" without the word "*suis*;" this is only an estate for their lives, for the uncertainty whose heirs are to take: Shep. Touch. 101. See *ante*, p. 112.

Husband and wife hold an acre of land jointly of A. for their lives: A. grants the reversion of the acre which the husband alone holds for his life; the grant is void, as no lands satisfy the description: Shep. Touch. 250.

Conveyance of "all those trees which could then reasonably be spared," held void for the uncertainty: *Mervyn v. Lyds*, Dy. 90a.

It is hardly necessary to point out that "every shift will be resorted to sooner than hold the gift void for uncertainty," *Doe d. Winter v. Perratt*, 6 M. & Gr. 362.

"The modern doctrine is not to hold a will void for uncertainty unless it is impossible to put a meaning upon it," per Jessel, M. R., *Re Roberts*, *Repington v. Roberts-Gawen*, 19 Ch. D. 529.

Rule 29.—If the description as a whole fits no object, but part of the description renders it certain what is intended, the rest of the description may be rejected. See *Shep. Touch.* 247.

Where part of the description renders it certain what is intended.

In *Cholmondeley v. Clinton*, 2 Jac. & W. 1, (*arg.* at p. 13), the case is put "where, under a limitation to heirs of a particular description, by purchase, a person apparently intended, though not exactly answering both parts of the description, has been allowed to take;" citing *Pybus v. Mitford*, 1 Ventr. 372; 1 Freem. 351, 369; 2 Lev. 75; *Brown v. Barkham*, 2 Vern. 729; *Burtenshaw v. Weston*, Fearn, App. 570; *Wills v. Palmer*, 5 Burr. 2615, &c. See *post*, Chap. XVII., HEIRS AS PURCHASERS.

In the application of this rule it must be remembered that we must take the words in their primary meanings, so that the same words may bear different meanings according to the circumstances of the person using them. The expression "All my books which I purchased from S.," would vary in its meaning according as I had or had not purchased books from S. If I had purchased some of my books from S., the latter words would be restrictive, but if I had not purchased any books from S. they would have to be rejected.

For Examples of the Rule see *post*, Chap. XII., PARCELS.

Observation.—If the part of the description Where the

part of the description which gives certainty applies to more than one object.

which gives certainty, applies to more than one object, we have a case of equivocation, and direct evidence of intention is admissible. See Rule 25.

Examples.—Grant by deed of “all the coal mines in the lands in the occupation of K. & Son.” It was shown that the grantor had not any lands at the time of making the grant “in the occupation of K. & Son.” These words were rejected, thus leaving a latent ambiguity, which was permitted to be explained by letters written by the grantor’s steward to the grantees prior to the grant, *Beaumont v. Field*, 1 B. & Al. 247.

The following examples are all cases of wills :—

Legacy to Robert Careless, my nephew, son of Joseph Careless. The testator had no brother named Joseph, but had two brothers, each of whom had a son called Robert. The word Joseph was rejected, and the description thus became “Robert Careless my nephew, son of — Careless;” this was equivocal, since there were two persons whom it fitted, and therefore direct evidence of intention was admitted: *Careless v. Careless*, 1 Mer. 384.

Legacy “to Sophia daughter of P. S.” He had two daughters, neither of whom was named Sophia. Evidence of intention admitted: *Still v. Hoste*, 6 Mad. 192.

Legacy “to — Price son of — Price.” Evidence of intention admitted: *Price v. Price*, 4 Ves. 679.

Part of description applying to one, part to another, but the whole applying to no object.

Rule 30.—If one part of the description applies to one object, and another part applies to another object, but the description as a whole applies to no object, the case is similar to that of a patent ambiguity and direct evidence of intention is not admissible.

Examples.—Devise to testator’s son John for life, with remainder “to his, the testator’s, grandson John, eldest

son of the said John for life," with remainders over. The testator's son John had been twice married : he had by his first wife an eldest son Simon, and by his second wife a son John and other children. Here part of the description "John the son of John" applies to one person, other part of the description "the eldest son of John" applies to another person. Held that direct evidence of intention was inadmissible : *Doe v. Hiscocks*, 5 M. & W. 368 ; S. C. Tud. L. C. Real P. (3rd ed.) 918.

To recapitulate : A person perusing a deed, without Recapitulation. knowing the circumstances of the parties, will detect the patent ambiguities, he will not detect equivocations or inaccurate descriptions, and he may or may not detect those latent ambiguities which are not equivocations. On the application of extrinsic evidence of the circumstances to determine the primary meanings of the words under Rule 11, and on interpreting the words according to the context under Rule 16, and the subsidiary Rules in Chapters VI. and VII., the patent ambiguities may disappear, the inaccuracies and latent ambiguities, including equivocations, will become manifest, and may subsequently disappear. If any equivocations remain, they may be resolved by further intrinsic evidence under Rule 24, or by direct evidence of intention under Rule 25. If, after this process has been gone through, there remain any ambiguities of either class, or any inaccuracies which are not made clear, no interpretation can be put on the deed.

An example may render this more clear ; let the question be,—Who is meant by "A.'s nephew J. living at S." ?

First, evidence, either extrinsic employed under Rule 11, or intrinsic under Rule 16, may show that by "nephew" is meant "grand-nephew."

Next, when we proceed to adduce further extrinsic evidence to ascertain who is meant by "A's grand-nephew J. living at S.," we may find that A. has two grand-nephews both named J., but that neither of them lives at S. Thereupon, under Rule 29, we reject the

description "living at S.," as being a mere inaccurate addition. We are now confronted with an equivocation, and we must endeavour to clear it up by applying further ordinary evidence, extrinsic under Rule 11 and intrinsic under Rule 24. But, if this fails to clear up the equivocation, then we may in the last resort, under Rule 25, apply direct evidence of intention to determine which of the two grand-nephews named J. was intended by the author of the deed.

CHAPTER IX.

DATE. PARTIES.

Deeds take effect from delivery: "From henceforth:"

Deed retained by grantor: Concealed deed: Want of notice to trustees: Escrow: Deed bearing false, erroneous, or impossible date or no date: "From the date:" "From the day of," &c.: Description of parties: Names of persons and corporations.

Rule 31.—A deed takes effect from the time of its delivery, not of its date; *Shep. Touch.* 72; *Plow.* 491 (a); *Clayton's Case*, 5 Rep. 1; *Goddard's Case*, 2 Rep. 4 b.; *Doe d. Whatley v. Telling*, 2 East, 257; *Steele v. Mart*, 4 B. & C. 272. Deed takes effect from delivery.

"If one covenants that J. S. shall have all his trees now standing, it refers to the trees standing at the time of delivery, and if any be felled after the date and before the delivery, he hath not any remedy for them;" *per Fleming, J., Oshey v. Hicks*, Cro. Jac. 263.

"The rule uniformly acted upon from the time of *Clayton's Case* to the present day is that a deed or other writing must be taken to speak from the time of its execution, and not from the date apparent on the face of it. That date is indeed to be taken *prima facie* as the true date of execution, but as soon as the contrary appears, the apparent date is to be utterly disregarded;" *per Patteson, J., Browne v. Burton*, 5 Dow. & Lownd., at p. 292, S. C., 2 Bail Court Rep. 220, 17 L. J. Q. B. 49.

A mortgage deed, dated the 27th day of October, 1827,

was executed on the 23rd of August, 1834. No interest was ever paid. On the 9th of February, 1854, the mortgagee issued a writ of ejectment. *Held*, that the deed was a sufficient acknowledgment of the plaintiff's title within 3 & 4 Will. 4, c. 27, s. 14. "If the deed is to be construed as speaking from the time of its date, the plaintiff's right of entry was barred by the statute; but if, on the other hand, the deed is to be read as speaking from the time of its execution, then there was a sufficient acknowledgment of the plaintiff's title within the meaning of the statute. We are all of opinion that the deed must be taken to speak from the time of its execution;" *per* Pollock, C. B., *Jayne v. Hughes*, 10 Ex. 430.

"From henceforth," "until the making."

A demise by deed to hold from "henceforth," means from the delivery, not from the date; Co. Litt. 46b: *Clayton's Case*, 5 Rep. 1 (but see *Llewelyn v. Williams*, Cro. Jac. 258), and includes the day of delivery, because the law disregards fractions of a day. "Until the making of these presents," means up to the delivery; *Hedley v. Joans*, Dy. 307 a, pl. 67.

Deed retained by party executing.

The operation of the deed is not suspended by the fact that the party who executes it retains it in his own custody.

"The efficacy of a deed depends upon its being sealed and delivered by the maker of it: not on his ceasing to retain possession:" *per* Lord Cranworth in *Xenos v. Wickham*, L. R. 2 H. L. 323. See also *Doe d. Garnons v. Knight*, 5 B. & C. 671; *Alleyne v. Alleyne*, 2 Jo. & Lat. 544; deed retained by covenantor and cancelled, good in equity, *Sepalino v. Twitty*, 2 Eq. Ca. Ab. 287; S. C., Sel. Ca. Ch. temp. King, 75; as to a grantor retaining and destroying a voluntary deed, see *Naldred v. Gilham*, 2 Eq. Ca. Ab. 287; *Sepalino v. Twitty*, *ubi-supra*.

Concealed deed.

The operation of a deed is not suspended by the fact that the person entitled to the benefit of it is ignorant of its existence.

Voluntary settlement never communicated to the beneficiaries, retained by the settlor and found after his death among his waste papers, upheld against a subsequent voluntary settlement made public, and against a will; *Clavering v. Clavering*, 2 Ver. 478, S. C. 7 Br. P. C., Ed. Tom. 410. See also *Barlow v. Heneage*, Finch Prec. Ch. 211.

Mortgagor retained mortgage deed in his own possession and did not communicate its existence to the mortgagee: it was found after his death. *Held*, that it took effect from its execution and was good against creditors: *Exton v. Scott*, 6 Sim. 81.

A., being indebted to a bank, executed a mortgage to them which was retained by his solicitor till after A.'s bankruptcy, and then handed over by the solicitor to the bank. *Held*, that it was good as against the assignee in bankruptcy; *Grugeon v. Gerrard*, 4 Y. & Col. Ex. 119.

The operation of a deed is not suspended by the absence of notice to trustees, where such notice is essential for perfecting an assignment made by the deed. Effect of want of notice to trustees.

Fletcher v. Fletcher, 4 Ha. 67; *Re Way's Trusts*, 2 De G. Jo. & S. 365; *Donaldson v. Donaldson*, Kay, 711.

Where an instrument is delivered as an escrow to take effect as a deed on the happening of a specified event, it does not take effect until that event happens; *Watkins v. Nash*, L. R. 20 Eq. 262; *Nash v. Flynn*, 1 Jo. & Lat. 162. Escrow.

“It is the ordinary and almost the invariable practice for the vendor to execute the conveyance and give it to his solicitor, who exchanges the deed for the purchase-money when paid by the purchaser: but it would be a monstrous thing for the purchaser to be allowed to say to the seller, ‘you have executed the deed and therefore

I need not pay the purchase-money; and I have got the legal estate, and you must enforce payment of the purchase-money as you can.' On the contrary I am of opinion the purchaser has no estate until he has the deed. This I take to be the ordinary case which occurs every day where the deed of conveyance is executed as an escrow;" *per Romilly, M. R., Walker v. Ware, &c., Railway Co.*, 35 Bea. 52. See also the remarks of the same judge in *Phillips v. Edwards*, 33 Bea. 440, at p. 447; but in *Kidner v. Keith*, 15 C. B. N. S. 35, Williams, J., says at p. 40, "In the ordinary case of a deed executed and left with the party's attorney, unless it is delivered to the attorney as an escrow, not to be delivered until the consideration money is paid or some other condition is performed, it operates as a perfect deed."

Land was vested in a trustee for the separate use of E., a married woman, with power for the trustee to lease at the request in writing of E.; the trustee and E. agreed by parol to let the property to P.; a lease was prepared, approved of, and executed by the trustee and E., but before their solicitor had parted with it, and before P. had executed the counterpart, E. recalled her assent to the lease; *held* that, as the lease was not intended to take effect till it was handed over to the lessee, who was to execute a counterpart, it was a mere escrow, and had no effect; *Phillips v. Edwards*, 33 Bea. 440.

See as to voluntary deeds not parted with and executed for a purpose never completed, *Cecil v. Butcher*, 2 J. & W. 565.

Evidence
admissible to
prove true
date.

Rule 32.—Where a deed bears an impossible or erroneous date, or bears no date at all, evidence is admissible to prove the true date, *i.e.*, time of delivery.

"The date of the deed many times antiquity omitted; and the reason thereof was, for that the limitation of prescription, or time of memory, did often in process of time change; and the law was then holden, that a deed bearing

date before the limited time of prescription, was not pleadable; and therefore they made their deeds without date, to the end that they might allege them within the time of prescription;" Co. Lit. 6 a.

"Also a deed is good albeit it mentions no time or place of date or making, or have a false date, *i.e.*, be dated at one time and delivered at another; and albeit it have an impossible date, as the 30th of February and the like, for anciently until the time of Ed. 2nd and Ed. 3rd, the deeds bore no date; because the law was then held, to be, that if a deed were dated before the time of memory it was not pleadable, except it were of record, but it might have been given in evidence. But he that doth plead such a deed without any date, or with such an impossible date, must set forth the time when it was delivered (*Dodson v. Kayes*, Yelv. 193), and support the averment by proof;" Shep. Touch. 55.

The date of a deed is not of the substance of a deed: for if it hath no date, or hath a false or impossible date, as the 30th day of February, yet the deed is good; *Goddard's Case*, 2 Rep. 4b.

Debt on obligation "dated the 10th October, but first delivered the 30th March," good. "For God forbid, when a deed is duly made, that by negligence or mistake of the clerk in writing the date, the party should lose the whole benefit of the deed and be without remedy;" *Stone v. Bale*, 3 Lev. 348.

See also *Hall v. Cazenove*, 4 East, 477; *Steele v. Mart*, 4 B. & C. 272; *Cooper v. Robinson*, 10 Mee. & Wels. 694; *Cox v. Day*, 10 East, 428.

Rule 33.—Where a deed bears no date, or an impossible date, and in the deed reference is made to the "*date*," that word must be construed "*delivery*;" but if the deed bears a sensible date, the word "*date*," occurring in the deed, means the day of the date, and not that of the delivery; *Styles v.*

Reference to
"date," how
construed.

Wardle, 4 B. & C. 908; S. C. 7 D. & R. 507; *Woodfall*, p. 138 (12th ed.)

"If an indenture of lease bear date which is void or impossible, as the 30th day of February, or the 40th of March, if in this case the term be limited to begin from the date, it shall begin from the delivery, as if there had been no date at all. And so it is, if a man by indenture of lease, either recite a lease which is not, or is void, or misrecite a lease in *esse*, in a material point, to have and to hold from the ending of the former lease, this lease shall begin in course of time from the delivery thereof;" Co. Lit. 46 B. See the *Bishop of Bath's Case*, 6 Rep. 34 b., and *Armitt v. Breame*, 2 Ld. Raym. 1076.

"From the day of," &c.

Rule 34.—A term limited to commence from the day of the date, or from the date of the deed, or from a certain day, will be taken to include or exclude that day, according to the subject-matter of the deed.

Examples.—Lease for lives, *habendum à datu*; *Hatter v. Ashe*, 8 Lev. 438; S. C. 1 Lord Raym. 34; and lease for lives to begin from the day of the date thereof; *Freeman d. Vernon v. West*, 2 Wils. 165; held, to include the day, as otherwise the lease would be void as granting a freehold to commence *in futuro*.

Power to lease for twenty-one years in possession; lease granted to commence from the day of the date; held, a good lease (Lord Mansfield's judgment discusses all the prior authorities); *Pugh v. Leeds*, Cowp. 714.

Lease for twenty-one years from the 25th March, 1809; held, not to expire till the end of 25th March, 1830, Lord Denman, C.J., saying, "The general understanding is, that terms for years last during the whole anniversary of the day from which they are granted;" *Ackland v. Lutley*, 9 Ad. & El. 879; see *Woodfall*, p. 137 (12th ed.).

See the cases collected in *Wilkinson v. Gaston*, 9 Q. B. 137.

Miscellaneous.

Evidence is admissible to explain an erroneous reference to the date of another instrument; *Honywood v. Honywood*, 2 Y. & C. C. C. 471.

A day "*now last past*" means last preceding the day of the delivery, not of the date; *Steele v. Mart*, 4 B. & C. 272.

Where by a deed made in August, 1832, being leap-year, a party covenanted to pay a sum of money on 29th February next ensuing, the words "29th February then next" were construed to mean 29th February in the next leap-year; *Chapman v. Beecham*, 3 Q. B. 723: S. C. 3 Gale & Dav. 71.

Parties.

Rule 35.—Evidence may be adduced to correct an erroneous or imperfect description of the parties. (See 1 Dav. Prec. 41.)

Evidence to correct description of parties.

"The name of the persons in grants is set down only to distinguish persons, and to make the person intended certain; and, therefore, howsoever it be best and most safe to describe the person by his true and proper name of baptism, and also by his surname, and if it be a corporation, by the true name whereby the corporation is made, yet mistakes in this case, unless they be very gross, will not make void the grant; *nihil facit error nominis cum de corpore constat*;" Shep. Touch. 233.

"Regularly it is requisite that the purchaser be named by the name of baptism and his surname, and that special heed be taken to the name of baptism; for that a man cannot have two names of baptism, as he may have divers surnames;" Co. Litt. 3 a; *MacDonnosh v. Stafford*, Palm. 100. In strictness all the names of baptism compose but one christian name; *per* Sir W. Scott, *Pougett v. Tomkyns*, 3 M. & S. 262, n.: see also *Scott v. Soans*, 3 East, 111; *Evans v. King*, Willes, 554.

Name of baptism.

" If the person be so described that he may be certainly known from other persons, the omission, or in some case the misprision, of the name of baptism, shall not avoid the grant; as a gift, '*omnibus filiis J. S.,*' or '*primo genito filio (a), J. S.,*' or '*uxori de J. S.,*' or, '*filia de J. S.,* when there is but one. The name of baptism of the Abbot of W. was *Richerus*, and he by the name of *Richardus*, Abbot de W., made a grant; and although his name of baptism was mistaken, yet because the other words, *sc. 'Abbas de W.,*' did certainly describe the person, for this cause the grant, notwithstanding the misprision of the name of baptism, was good. So, if a grant be made to *J. S. et Margaritæ uxori suæ*, where the wife's name is Marlon, yet the grant is good, although the name of baptism be mistaken, because *uxori suæ* is a certain description of the person;" *Dr. Ayray's Case*, 11 Rep. 21 a.

Party described by incorrect name.

Where a person is described in a deed, and executes it, by the name by which he usually passes, which is not his correct name, the deed will be upheld on evidence of identity being given; *Addis v. Power*, 7 Bing. 455; *Shaw v. Hunt*, 8 Taunt. 645; *Williams v. Bryant*, 5 M. & W. 447; *Gould v. Barnes*, 3 Taunt. 504.

Where a man was called by an incorrect name throughout a deed, but executed it by his correct name, the deed was upheld as his deed; *Janes v. Whitbread*, 11 C. B. 406, 413. See *Viner Abr. Tit. Faits, B.*

Firm.

Where a firm is made a party to a deed, evidence is admissible to show who in fact constituted the firm at that time; *Lindley* (4th ed.), 208; *Carruthers v. Sheddon*, 6 Taunt. 14; *Maughham v. Sharpe*, 17 C. B. N. S. 443; 34 L. J. N. S. C. P. 19.

Class.

The individuals composing a class which is capable of being ascertained may be made parties by the name of

"Eldest" son. (a) That an "eldest" includes an only son, see *Tuite v. Birmingham*, L. R. 7 E. & I. App. 634; see further as to the meaning of "eldest son," *Bathurst v. Errington*, 2 App. Cas. 698; *Meredith v. Treffry*, 12 Ch. D. 170; *Re Bayley's Settlement*, L. R. 6 Ch. 590, see *post*, Chapter on ELDEST SON.

that class, as "all a man's creditors;" *Gresty v. Gibson*, L. R. 1 Ex. 112; *Reeves v. Watts*, L. R. 1 Q. B. 412; *Isaacs v. Green*, L. R. 2 Ex. 352; *M'Laren v. Baxter*, L. R. 2 C. P. 559; see *supra*, Chap. IV., p. 48.

Though a corporation should be described by its proper Corporation. name, *i.e.* by the name by which it was incorporated, it is sufficient to use such name as will identify it; *Dr. Ayray's Case*, 11 Rep. 18 *b*; *Croydon Hospital v. Farley*, 6 Taunt. 467; see also *The Dutch West India Co. v. Van Moses*, 1 Stra. 612; *Fanshawe's Case*, Moo. 228; *Mariot v. Mascal*, And. 202; *Pits v. James*, Hob. 121; *Button v. Wrightman*, Ross. 56; Grant on Corporations, p. 50, *et seq.*

The King incorporated a borough by the name of the Mayor and Burgesses of his borough of Lynne Regis, commonly called King's Lynne: a person became bound to the corporation in a bond by the name of the Mayor and Burgesses of Lynne Regis. *Held*, that the bond was good. The name of a corporation in grants or conveyances need not be *idem syllabis seu verbis*; it is sufficient if it be *idem re et sensu*; *Mayor and Burgesses of Lynne's Case*, 10 Rep. 122*b*; and see *Finch's Case*, 6 Rep. 65*a*.

A false addition to a party will not vitiate the deed, where it is clear what person is meant.

Conveyance made to Rodolfe Evers, Knight, Lord Evers: *held*, that the conveyance was good, though at the time it was made he was not a knight or reputed to be a knight; *Evers v. Strickland*, 1 Bulstrode, 21; though it has been said that a grant to a knight by the name of Esq. is void, *Rex v. Bishop of Chester*. 1 Id. Ray. 303.

A bastard can be made a party by his name of reputa- Bastard. tion; Co. Litt. 3*b*; and he may be described as the "son" of his reputed father when he has acquired the reputation of being so; 6 Rep. 65*a*. See as to gifts to illegitimate children by will, Elph. Introd. Conv. 3rd ed. 427, *post*, Chapter on CHILDREN.

Reputed wife. Where a woman who had gone through the ceremony of marriage, which was afterwards discovered to be invalid, executed a deed by the description of "Eliza, the wife of" the reputed husband, the description was held sufficient; *Boughton v. Sandilands*, 3 Taunt. 342. See as to gifts to a reputed wife by will, Elph. Introd. Conv. 3rd ed. 426.

Divorced woman. As to the name of a woman who has been divorced, see *Fendall v. Goldsmid*, 2 P. D. 263.

Change of surname. A man may change his name, *i.e.*, his surname, as often as he likes, no fraud being intended; *per* Tindal, C.J., *Davies v. Lowndes*, 2 Scott, 103; 1 Bing. N. C. 618. See also *Doe v. Yates*, 5 B. & Ald. 544; *Leigh v. Leigh*, 15 Ves. 100; *Re Matthews*, 16 Beav. 245; *Re James*, 5 Ex. 310; *Re Dearden*, 5 Ex. 740.

See, further, as to parties, names, and descriptions, Cruise, Dig. Tit. xxxii., *Deed*, ch. xxi., ss. 7 *et seq.*; 3 Dav. Prec. 357, note (m); Elph. Introd. Conv., 3rd ed., p. 59, *et seq.*

CHAPTER X.

RECITALS.

Variance between recitals and operative part: Descriptions general and specific: Recital of agreement for sale: Parcels, how affected by recitals: Covenants: Releases: Misrecitals: Estoppel by recital: Recital creating covenant.

Rule 36.—Where there is a discrepancy between the recitals and the operative part of a deed, the operative part, if clear and unambiguous, must be followed. Operative part, if clear, not controlled by recitals.

Coroll.—A specific description of property, or a specific description of what is intended to be done contained in the operative clauses, will not be controlled by a general description, or a general or ambiguous statement, contained in the recitals. Specific description in operative part.

“The reciting part of a deed is not at all a necessary part either in law or equity. It may be made use of to explain a doubt of the intention and meaning of the parties, but it hath no effect or operation. But when it comes to limit the estate, there the deed is to have its effect according to what limitations are therein set forth, and that is plain and full, without any manner of contradiction whatsoever;” *per Holt, C. J., Bath & Mountague’s Case*, 8 Ca. Ch. 101.

“When the words in the operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled by the recitals or other parts of the deed;”

per Patteson, J., *Walsh v. Trevanion*, 15 Q. B. 751; 19 L. J. Q. B. 458; 14 Jur. 1184.

"Where the operative part of the deed uses language which admits of no doubt, it cannot be controlled by the recital;" *Bailey v. Lloyd*, 5 Russ. 344.

"It is of the greatest consequence to keep distinct the different parts of deeds, and to give to recitals and to the operative part their proper effects. I have always held that where the recitals and the operative part of a deed are at variance, the operative part must be officious, and the recitals inofficious. I do not say inoperative, for the recitals may be useful in explaining ambiguities;" *per* Romilly, M. R., *Young v. Smith*, L. R. 1 Eq. 188; S. C. 35 Beav. 90; 11 Jur. N. S. 963.

"It is impossible by a recital to cut down the plain effect of the operative part of a deed;" *per* Romilly, M. R., *Holliday v. Overton*, 14 Beav. 467.

"The rule is that a recital does not control the operative part of a deed where the operative part is clear;" *per* Jessel, M. R., *Dawes v. Tredwell*, 18 Ch. D. 358.

"I am not aware of any authority in which a clear, precise, and specific description of property in the operative part of a deed has been controlled at law by the effect of mere recitals, or by inference from the covenants or subsequent parts of the deed;" *per* Jessel, M. R., *Howard v. Earl of Shrewsbury*, L. R. 17 Eq. 394; see also *Re Owen's Trust*, 1 Jur. N. S. 1069.

"If there is any doubt about the construction of the governing words of that document, the recital may be looked at in order to determine what is the true construction; but if there is no doubt about the construction, the rights of the parties are governed entirely by the operative part of the writing or deed;" *per* Brett, L. J., *Leggott v. Barrett*, 15 Ch. D. 311.

Bond.

Examples.—Where a bond was taken in the penalty of £1000, held that the penalty could not be cut down to £500 by a recital that the parties had agreed to execute a bond for that amount; *Ingleby v. Swift*, 10 Bing. 84.

Covenant.

If a deed contain an absolute covenant not to do a

certain act, such covenant will not be controlled by a recital that the parties intended that, on the payment of a sum of money for liquidated damages, it might be done; *Bird v. Lake*, 1 H. & M. 111.

Two partners, to secure a partnership debt, conveyed certain joint property particularly described in the deed, "and all other the hereditaments of them, or *either of them*, situate *elsewhere* in the town of M.," but the recitals, covenants, and provisions in the deed, related solely to the joint property; *held*, that the deed extended to a separate estate of one of the partners situate in M.; *Ex parte Young*, 4 Deac. 185. Conveyance.

By articles reciting that A. had agreed to give a mortgage of "his *freehold* estates at I., *subject to the charge affecting the same*," A. agreed to execute a mortgage of "all his lands, tenements, and hereditaments, at or near I. aforesaid;" *held*, that copyhold property and also freehold property, not subject to the charge, was subject to the agreement; *Ex parte Glyn*, 1 M. D. & De Gex, 29.

Transfer of a mortgage containing a recital that "in the now reciting indenture a power of sale is contained for the better securing of the principal sum and interest, but the said power has not been, and is not intended to be exercised," followed by assignment of the moneys due on the mortgage, "and all powers and remedies for recovering the same sums respectively, and all benefit of the said several indentures of mortgage, and of every covenant and security therein respectively contained;" *held*, that the power of sale in the recited mortgage was capable of being exercised: *Boyd v. Petrie*, L. R. 7 Ch. 385. Transfer of mortgage.

A marriage settlement recited an agreement that the future property of the wife should be settled, but the covenant to settle was by the husband alone; *held*, that the wife was not bound; *Young v. Smith*, 35 Beav. 87; L. R. 1 Eq. 180; *Hammond v. Hammond*, 19 Beav. 29; *Dawes v. Tredwell*, 18 Ch. D. 354. And conversely, where the recital was of an agreement that the husband should covenant to settle the after-acquired property of Settlement.

the wife, followed in the operative part by an agreement by all parties and a covenant by the husband to settle it; *held*, that the property afterwards given to the separate use of the wife was bound; *Willoughby v. Middleton*, 2 J. & H. 344.

Settlement reciting agreement to settle five distinct denominations of lands, specifically described; grant to trustees of three only of the denominations; *held*, that the omitted denominations were not bound by the trusts of the settlement; *Macnamara v. Carey*, 1 Ir. Rep. Eq. 9. See *Barratt v. Wyatt*, 30 Beav. 442, S. C. 31 L. J. Ch. 652; 6 L. T. N. S. 801.

A marriage settlement contained a recital of an agreement to settle a certain estate "except the town and lands of B. and its sub-denominations." The operative part conveyed *inter alia* K., which was one of the sub-denominations of B.; *held*, that it passed; *Alexander v. Crosbie*, Ll. & Goo. 145. See *per* Sugden, C., at p. 152.

Recital of agreement for sale followed by receipt for purchase money.

The rule must be applied with some caution, for, bearing in mind that an agreement for the sale of property, accompanied by the payment of the purchase money, operates as a conveyance in equity, it appears that a recital of an agreement for the sale of Blackacre and Whiteacre for a certain sum, followed by a conveyance, "in pursuance of the recited agreement and in consideration of the said sum of £—— (the receipt, &c.)" of Blackacre only will operate in equity as a conveyance of Whiteacre also. But a recital of an agreement for the sale of Blackacre for a certain sum, followed by a conveyance of Blackacre and Whiteacre for that sum appears to fall within the rule.

Ambiguous operative part controlled by recitals.

Rule 37.—Where the operative part of a deed is ambiguous, it may be controlled by clear and unambiguous recitals.

Specific statement in recitals not enlarged by general state-

Coroll.—A specific description of property or a specific statement of what is intended to be done, contained in the recitals, will not be enlarged.

by a general description, or a general or ambiguous statement contained in the operative clauses. See ^{ment in operative part.} Dart V. & P. (5th ed.) p. 522; 1 Dav. Prec., 4th ed., p. 51; Burton, Comp. sec. 530.

“We may consider it settled by authority that where the words of a covenant are ambiguous and difficult to deal with, we may resort to the recitals to see whether they throw any light on its meaning;” *per* Jessel, M. R., *Re Michell's Trusts*, 9 Ch. D. 9.

“If the operative part of a deed be doubtfully expressed, there the recital may safely be referred to as a key to the intention of the parties;” *per* Leach, M. R., *Bailey v. Lloyd*, 5 Russ. 344.

“As to the construction of the settlement, I do not dispute the proposition which was argued, that if you find in a settlement recitals indicating various parcels enumerated, from whence it is to be inferred, from reading the recital alone, that these parcels, and these alone, are to be included in and made subject to the provisions of the deed, but yet you find that in the operative part of the deed one or two of these parcels are omitted (a), the Court may be of opinion, upon the construction of the deed, that the parcels which are omitted in the operative part are omitted by mistake (b), and are not included in the provisions of the deed. And the converse of that proposition is also true; parcels may be included in the operative part of the deed which the recitals and the rest of the deed show to have been inserted there by mistake. There are several cases to that effect, and amongst them the well-known case, before Lord Mansfield, of *Moore v. Magrath* (1 Cowp. 9),” *per* Romilly, M. R., *Barratt v. Wyatt*, 30 Beav. 443, S. C. 31 L. J. Ch. 652; 6 L. T. N. S. 801.

“Though the words used might by themselves be capable of a different meaning, we may call in aid the

(a) See *Maenamara v. Carey*, 1 Ir. Eq. Rep. 9, cited *sup.* p. 132.

(b) *See*. But query “are omitted and are not included, &c., by mistake.”

recitals to explain them. . . . The right course is to construe it [the instrument] by the light of the recitals;" *per* Channell, B., *Gwyn v. Neath Canal Co.*, L. R. 8 Ex. 219. And see *per* Patteson, J., in *Walsh v. Trevanion*, 15 Q. B. 751; S. C. 19 L. J. Q. B. 458; 14 Jur. 1134.

"Where the recital is that you intend to convey certain specific property, and the general words in the habendum, including 'interest,' and the like, are sufficiently large to carry other property which is not specified and is distinct from that which is specified in the recital, that other property does not pass:" *per* Lord Romilly, M. R., *Neame v. Moorsom*, L. R. 3 Eq. 97.

"Nothing I consider is better settled than that these general words, even where they would pass the land *ex vi terminorum*, are restricted by the recitals and what is called the scope of the instrument. The principle is, that though words of specific description are not easily dealt with, yet general words are; and that although general words may be in themselves large enough, yet if, upon the whole scope of the instrument, as to which especial regard is to be had to what I call introductory recitals, it appears it was not the intention of the parties to pass those properties, it will not pass them;" *per* Jessel, M. R., *Howard v. Earl of Shrewsbury*, L. R. 17 Eq. 391.

Examples.

Examples.—Where the operative part of a deed (which was not by way of present conveyance but of covenant) appeared to have been intended to follow, but did not accurately follow, the words of a recital, the effect of the operative part was limited to the extent pointed out by the recital: *Re Neal's Trusts*, 4 Jur. N. S. 6.

Parcels.

"All that the one equal eighth part or share, or other the part or share, parts or shares, &c.," restricted by the recitals to one eighth share; *Gray v. Earl of Limerick*, 2 De G. & Sm. 370.

Conveyance of "all the lands, &c., of A. & B., situate in" eight parishes (naming them) "and which are in-

tended to be specified and described in the schedule hereunder written, but which schedule is not intended to abridge or affect the generality of the description hereinbefore expressed and contained;" restricted by the recitals to the property comprised in the schedule; *Walsh v. Trevanion*, 15 Q. B. 798 : S. C. 19 L. J. Q. B. 458 ; 14 Jur. 1134.

Recital that by virtue of certain deeds, certain specified hereditaments, "and all other the hereditaments in the county of Y. hereinafter expressed to be appointed and released," stood limited as settlor should appoint, and subject thereto to him in fee ; and of an agreement for the settlement of the estates in the county of Y., "hereinafter mentioned and intended to be hereby conveyed," followed by an appointment and conveyance of the specified hereditaments mentioned in the recital, and "all other the hereditaments in the county of Y., of or to which the grantor was seised for an estate of inheritance;" *Held*, that an estate in the county of Y., of which the grantor was seised, but which was not specifically mentioned in the recited deeds or the parcels in the conveyance, did not pass ; *Jenner v. Jenner*, L. R. 1 Eq. 361.

Lease, reciting former demise of the parcels, described as "59 acres provincial measure ;" and an intention to demise the "said estate," demised "the same being 45 acres statute measure ;" *Held*, that the soil of a road which had been made and set out between the times of making the leases, and was part of the parcels comprised in the first lease, passed by the second ; *Doe d. White v. Osborn*, 4 Jur. 941.

Settlement, reciting an agreement that a moiety of all such property as A. B. should at any time during the Settlement. coverture be or become seised or possessed of, or interested in or entitled unto, should be settled : A. B. covenanted that in case any lands should at any time during the coverture *accrue unto or vest in him* upon the death or by the settlement or devise of any person, he should convey one moiety to the trustee. *Held*, that land of which A. B. was tenant in tail in remainder subject to the life interest

of his father, but defeasible by his father making an appointment, was subject to the covenant; *MacLurgan v. Lane*, 7 W. R. 135; 10 Jur. N. S. 56, 59.

By a settlement, made in 1826, £30,000 was settled in trust for a woman for life, with remainder for children as she should appoint, and in default for them equally, the shares of sons to vest at twenty-one, of daughters at twenty-one or marriage; there were two children, a son and a daughter: the mother appointed £10,000 to the son on his marriage: the settlement made on his marriage in 1850, recited that he was entitled to £10,000, and also entitled to the rest of the fund contingently on the death of his sister under twenty-one unmarried, without prejudice to the trusts of the settlement of 1826, and an agreement to settle the £10,000 and "all other his part, share, and interest, as well vested as contingent" in the trust funds. The son then assigned his interest in the same terms. The daughter attained twenty-one and died, and the mother appointed the residue of the funds to her son. *Held*, that it did not pass under the settlement; *Childers v. Eardley*, 28 Beav. 648.

Omission of
name from
operative
part.

Where a deed, to which a married woman was party, and which was acknowledged by her, contained recitals of an agreement for the sale of lands in which her husband was interested, free from incumbrances; and that she and her husband had agreed to join in the same for the purposes thereafter mentioned; but her name was omitted throughout the operative part and the covenant for title. *Held*, that her dower was barred, reliance being placed on the fact that if the wife's dower was not bound, she would have executed a deed in the most solemn manner known to the law and have passed nothing by it; *Dart v. Clayton*, 4 N. R. 221; S. C. 33 L. J. Ch. N. S. 503; 10 Jur. N. S. 671; 12 W. R. 903 (sub nom. *Dent v. Clayton*).

Appointment
of new
trustees.

Conveyance by retiring to new trustee of specific parcels, "and all other monies, securities, property, and effects, now vested jointly in the retiring and continuing trustee;" *Held*, on consideration of the recitals, the wit-

nessing part, the state of the property, and mode of dealing with it, not to pass leaseholds not specifically mentioned; *Hopkinson v. Lusk*, 34 Beav. 215; 10 Jur. N. S. 288.

Covenants apparently dependent shown by recitals to be independent; *Lloyd v. Lloyd*, 2 My. & Cr. 192. Covenants
apparently
dependent.

Bond for the good behaviour of A. "so long as he shall continue deputy-postmaster," with a recital that he had been appointed for six months. *Held*, that the bond was restricted to his behaviour during the six months. *Lord Arlington v. Merrieke*, 2 Wms. Saund. 411 (p. 813, ed. 1871). Bond.

For other instances of the statements in the operative part being controlled by the recitals, see *Moore v. Magrath*, 1 Cowp. 9; S. C. Lofft, 398 (parcels restricted); *Denison v. Holiday*, 1 H. & N. 681; S. C. 3 H. & N. 670; (parcels restricted); *Hunt v. White*, 37 L. J. Ch. 326; S. C. 16 W. R. 478 (covenant for quiet enjoyment restricted); *Cholmondeley v. Clinton*, 2 J. & W. 1; S. C. 2 Mer. 171; 4 Bligh, 1; 2 B. & Ald. 625 (limitations explained); *Lampon v. Corke*, 5 B. & Ald. 606; S. C. 1 D. & Ry. 211 (receipt qualified, see this case discussed in *Bottrell v. Summers*, 2 Y. & J. 407); *Re Daniel*, 1 Ch. D. 375, where the construction of the usual trusts for children in a settlement in which the trusts for daughters were omitted, was aided by a recital of an intention to provide for "children." Miscellaneous.

The most striking instance of the generality of the operative words being controlled by the recital occurs in a release. Releases.

"If a release is given on a particular consideration recited, notwithstanding that the release concludes with general words, yet the law, in order to prevent surprise, will construe it to relate to the particular matter recited, which was under the contemplation of the parties, and intended to be released;" *per* Lord Hardwicke, C., *Ramsden v. Hyllton*, 2 Ves. Sen. 310.

“If there be introductory matter, that will qualify the general words of the release;” *per* Best, J., *Lampon v. Corke*, 5 B. & Ald. 611; S. C. 1 D. & Ry. 211.

“The general words of a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given;” *per* Lord Westbury, *L. & S. W. Ry. Co. v. Blackmore*, L. R. 4 H. L. 623. And see *Dav. Prec.* Vol. V., pt 2, p. 147 (3d ed.); 2 *Wms. Saund.* 47 (p. 141, ed. 1871), n. (f) to *Fowell v. Forrest*.

Release.

Operative part
restricted by
recitals.

Examples.—*General words of release restricted by recitals*; *Knight v. Cole*, 3 Lev. 273; S. C. 1 Show. K. B. 150; S. C. Carth. 118; *Anon.* 2 Roll. Ab. 409; *Payler v. Homersham*, 4 M. & S. 428; *Simons v. Johnson*, 3 B. & Ad. 175; *Lindo v. Lindo*, 1 Bea. 496; *Anon.* 31 Bea. 310; *Thorpe v. Thorpe*, 1 Lord Ray. 235, 662.

In the following cases the general words in the release were limited to the matters which the parties had in contemplation, though they were not mentioned in the recitals; *Heun v. Hanson*, 1 Sid. 141; *Stokes v. Stokes*, 1 Lev. 272; S. C. 2 Keb. 530; S. C. sub nom. *Nokes v. —*, 1 Vent. 35; *Morris v. Wilford*, 2 Lev. 214 (where the marginal note appears to be incorrect); S. C. 3 Keb. 814; 2 Show. 47; *Farwell v. Coker*, 2 Ja. & W. 192; *Major v. Salisbury*, 2 D. & L. 763; S. C. 14 L. J. Q. B. 118; *Solly v. Forbes*, 4 Moo. 448; *Lyall v. Edwards*, 6 H. & N. 337; *London & South Western Ry. Co. v. Blackmore*, L. R. 4 E. & I. App. 610; *Turner v. Turner*, 14 Ch. D. 829.

Concurrence in
conveyance to
obviate objec-
tions to the
title.

It appears that if, for the purpose of obviating objections to a title, a person joins in the conveyance, which recites specified objections, he is not bound, except as to the interest appearing by the objections to be vested in him; but that, if the recital is generally that there are objections to the title, without stating what they are, it must be taken that he has inquired into the nature of such objections, and he cannot afterwards raise any ques-

tion as to the extent of his information, so that every interest that he has is bound ; *Lord Braybrooke v. Inskip*, 8 Ves. 417 ; S. C. Tud. Lead. Cas. R. P. (3rd ed.), 986 ; and see 2 Mer. 355.

Misrecitals.

Rule 38.—A misrecital will not vitiate the deed, Misrecitals.
if it be sufficiently clear what is intended.

Examples.—A misrecital of a lease in a grant of the reversion does not invalidate the grant ; *Withes v. Casson*, Hob. 128.

Grant of a manor held good, though in reciting a fine which formed part of the title, the names of the plaintiffs and deforciantes were transposed, “ for there is sufficient certainty of the thing granted, and of the intention of the parties to grant it,” the rest of the description of the fine being correct, *Moody v. Lewen*, Cro. El. 127 ; S. C. more fully reported sub nom. *Lewen and Mody’s Case*, 3 Leon. 135.

If, on the grant of a reversionary lease, an existing lease to A. is recited, and the date is incorrectly stated, In grant of reversionary lease. it appears that, if the habendum is made from and after “ the *said* lease,” or “ the expiration, surrender, or forfeiture of the *said* lease,” the term commences immediately ; but, if the habendum is “ from and after the lease to A.” or “ after A.’s interest determined,” the term commences on the expiration of A.’s lease ; see Co. Litt. 46 b., note 10 ; *The Bishop of Bath’s Case*, 6 Rep. 36 (b) ; *Mount v. Hodgkin*, Dy. 116 a ; S. C. 1 And. 8 ; *Holt v. Roper*, Bendl. 84 ; *Footte v. Berkly*, 1 Lev. 284 ; and see Platt on Leases, vol. 2, pp. 63, 69, and cases there cited ; Shep. Touch. 77. The reason apparently is, that in the former case the term is made to commence on the determination of a term which does not exist, in the latter case on the determination of a term which, though not described by the deed, can be ascertained by extrinsic evidence admissible under Rule 11, *ante*, p. 47.

A misrecital may influence the construction.

Where the words of a recovery deed were in themselves sufficient to have passed an advowson appendant to a manor, yet, as it appeared from an erroneous recital that the parties believed it not to be appendant, it was held not to pass; *Moseley v. Motteux*, 10 M. & W. 588.

Estoppel by recital.

Recital may
operate by
estoppel.

In connection with the subject of misrecital, it should be observed that, contrary to the old doctrine, Co. Litt. 352 *b* (see 1 Dav. Prec., p. 61, 4th ed.), it is settled law that a recital may operate by way of estoppel; (see 2 Sm. L. C. (8th ed.), 872 *et seq.*, and the authorities collected in *Bowman v. Taylor*, 2 Ad. & E. 278; *Bowman v. Rostron*, 2 Ad. & E. 295; *Hill v. Manchester Waterworks*, 2 B. & Ad. 544; *Lainson v. Tremere*, 1 Ad. & E. 792; S. C. 3 Nev. & M. 603), subject to the following qualifications and remarks:

Recital must
be precise,

(1.) The recital must be "precise and unambiguous;" *per* Lord Cairns, C., *Heath v. Crealock*, L. R. 10 Ch. 80; there must be "a distinct averment of the grantor's title;" *per* Wood, V.-C., *Crofts v. Middleton*, 2 K. & J. 194. It must be "a distinct recital of a particular fact;" (*per* Parke, B., *Carpenter v. Buller*, 8 M. & W. 212), and not general in its terms, for "it is a rule that an estoppel should be certain to every intent;" *per* Lord Tenterden, C. J., *Right v. Bucknell*, 2 B. & Ad. 281. See also *General Finance, &c., Co. v. Liberator Society*, 10 Ch. D. 15.

not general :

"A general recital will not operate as an estoppel, but the recital of a particular fact will have that effect;" *per* Lord Lyndhurst, C., *Bensley v. Burdon*, 8 L. J. Ch. 85; on app. from 2 Sim. & S. 519. See Co. Litt. 352 *b*; 1 Dav. Conv., p. 61, 4th ed.; Sugd. V. & P. (14th ed.), 739 *n.*; Dart V. & P. (5th ed.), 810—811; 2 Sm. L. C. (8th ed.) 874; *Salter v. Kidley*, 1 Show. K. B. 58; *Right v. Bucknell*, 2 B. & Ad. 278; and an American work, Bigelow on Estoppel, ch. X., p. 266.

(2.) The recital must be of a material fact; see *per* Parke, B., *Carpenter v. Buller*, 8 M. & W. at 213; *Bowman v. Taylor*, 4 Nev. & M. 267 note (e), citing *Anon.*, 2 Leon. 11; Co. Litt. 352, 4th rule. must be of material fact.

(3.) "An estoppel is always in some action or proceeding based on the deed in which the fact in question is recited. In a collateral action there can be no estoppel;" *per* Wood, V.-C., *Carter v. Carter*, 8 K. & J. 645: And see 2 Sm. L. C. (8th ed.) 876; *Frazer v. Pendlebury*, 81 L. J. C. P. 1; S. C. 10 W. R. 104; *Ex parte Morgan*, 2 Ch. D. 72; *Carpenter v. Buller*, 8 M. & W. 209; *S. E. Ry. Co. v. Warton*, 6 H. & N. at p. 527 (a). But consider *Billson v. Crofts*, L. R. 15 Eq. 314, where A., being entitled to a life interest determinable on insolvency, executed a composition deed which recited that he was then insolvent; this was held to estop him as plaintiff in a suit for a declaration that he had not forfeited his life interest by executing the deed. Estoppel only in action on the deed.

(4.) In equity a mistake of fact may be proved so as to prevent estoppel by recital; *Brooke v. Haymes*, L. R. 6 Eq. 25; *Scholefield v. Lockwood*, 33 L. J. Ch. 106; *Empson's Case*, L. R. 9 Eq. 597.^a Mistake prevents estoppel.

(5.) It is a question of construction on the whole deed whether the language of a recital is to be taken as that of all parties or of some or one of them only, and the estoppel is limited accordingly. "When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But, when it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument. All the cases were brought forward and considered in *Young v. Raincock* (7 C. B. 310), and we have no doubt that the result of them is as above stated;" *per* Patteson, J. *Stroughill v. Buck*, 14 Q. B. 787; S. C. 19 L. J. Q. B. 209. The real intention and object of the admissions must be looked to; *S. E. Ry. Co. v. Warton*, 6 H. & N. 520; *Morton v.* Estoppel, how limited as to parties.

(a) *Bittlestone v. Cooke*, 6 El. & Bl. 296.

Woods, L. R. 3 Q. B. 658; 4 Q. B. 293; 38 L. J. Q. B. 81.

Estoppel,
when nega-
tived by deed
itself.

(6.) Generally there is no estoppel if the allegation sought to be set up by estoppel is negatived on the face of the instrument itself. See *Co. Litt.* 352b. (8th rule), and *Doe d. Lumley v. Scarborough*, 4 Nev. & M. 724; S. C. 3 Ad. & E. 2; *Right v. Bucknell*, 2 B. & Ad. 281, "Nor shall a man be estopped where the truth appears by the same instrument," (*per* Lord Tenterden, C. J.). And so 1 Dav. Conv. p. 61 (4th ed.). But this doctrine does not apply to cases in which, as in *Morton v. Woods*, L. R. 3 Q. B. 658; 4 Q. B. 293, the existence of the relation of landlord and tenant is in question. See at p. 303, *per* Kelly, C.B., "If any of the decisions or dicta were to lead to the conclusion that where the truth appears there can be no estoppel, that doctrine must be taken to be over-ruled by the case of *Jolly v. Arbutnot* (4 De G. & J. 224)."

Estoppel
against mar-
ried woman.

(7.) *Semble*, there may be estoppel against a married woman, *Jones v. Frost*, L. R. 7 Ch. 773.

Recitals in
former deeds.

(8.) A party to a deed of conveyance is not estopped by recitals contained in other deeds through which the title so conveyed is derived; *Doe d. Shelton v. Shelton*, 4 N. & M. 857; 3 Ad. & El. 265. In that case there was a conveyance of lands to A., reciting the bankruptcy of B. The deed was not executed by A. Then A. executed a settlement of the lands. Lord Denman, C. J. said:—"Is it true as a general proposition that a party so claiming adopts the statement of facts in an anterior deed which goes to make up his title? We are aware of no authority for such a doctrine (4 N. & M. 867; 3 Ad. & El. 283)."

In *Melbourne Banking Corporation v. Brougham*, 7 App. Cas. 307, the official assignee in insolvency of B. executed a release to mortgagees of the equity of redemption of an estate mortgaged by B. B. afterwards took from the assignee a conveyance of all the estate vested in him under the insolvency, and then instituted a suit to set aside the release on the ground of misrepresentation or

mistake as to facts therein recited. It was held that the onus was upon B., who was *prima facie* bound by the admissions under seal of his vendor, to prove the falsehood of the representations.

On the other hand, in *Doe d. Gaisford v. Stone*, 3 C. B. 196, a purchaser was held bound by a recital that estopped his vendor.

(9.) Jessel, M. R., expressed a disinclination to extend the doctrine of estoppel by deed; *Gen. Finance, &c., Co. v. Liberator, &c. Socy.*, 10 Ch. D. 15. Doctrine not to be extended.

A party to a deed can obtain the benefit of an estoppel, though he did not execute it; *Hungerford v. Becher*, 5 I. C. R. 417. Person not executing deed.

A recital in a deed may operate as a covenant where it appears to have been the intention of the parties that it should so operate; *Hollis v. Carr*, Freem. Ch. 3, S. C. 2 Mod. 86; 3 Swanst. 638; see *Young v. Smith*, 35 Beav. at p. 89; *Lay v. Mottram*, 19 C. B. N. S. 479; *Monypenny v. Monypenny*, 4 K. & J. 174; 3 De G. & J. 572; 9 H. L. C. 114; *Iven v. Elwes*, 3 Drew. 25. See *post*, Chapter on COVENANTS. Recital may create covenant.

An action may be maintained upon such implied covenant; *Sampson v. Easterby*, 9 B. & C. 505; S. C. in error, 6 Bing. 644; 1 C. & J. 105; *Saltoun v. Houstoun*, 1 Bing. 438; *Farrall v. Hilditch*, 5 C. B. N. S. 840.

But "the recital of an agreement does not create a covenant where there is an express covenant to be found in the witnessing part relating to the same subject matter;" *per* Jessel, M. R., *Dawes v. Tredwell*, 18 Ch. D. 359. But not where covenant in witnessing part.

"The admission of a debt, as a general rule, by an instrument under seal would amount to a covenant to pay it, and the question was whether it had that effect in this deed. If it was a general and unqualified admission, that was the effect of it; but if the object was

to acknowledge that debt merely as the ground of giving security of a particular character for it, then it was not the creation of a personal liability to pay, but was only introduced with the object of giving security ;" *per* Malins, V.-C. *Jackson v. N. E. Ry. Co.*, 7 Ch. D. 583, discussing *Courtney v. Taylor*, 7 Sc. N. R. 765, 6 Man. & G. 851, and other authorities. See also *Iven v. Elwes*, 3 Drew. 25 ; 24 L. J. Ch. 249 ; 1 Jur. N. S. 6.

Miscellaneous.

Power exercised by recital.

A recital in an instrument capable of operating as the execution of a power, *Poulson v. Wellington*, 2 P. W. 533 ; *Wilson v. Piggott*, 2 Ves. jun. 351, see p. 355 ; even if the recital is only of a past transaction which by itself would not have been a sufficient execution of the power, *Lees v. Lees*, 1 R. 5 Eq. 549, may amount to an execution of the power.

Other effects of recital.

A recital may amount to a conveyance within the Stamp Acts, see *Phillips v. Gibbons*, 5 W. R. 527 ; *Morsfall v. Hey*, 2 Ex. 778.

Recital of a former deed proves only so much of it as is stated in the recital ; *Gillett v. Abbott*, 3 N. & P. 24 ; 1 W. W. & H. 89 ; 7 A. & E. 783, 2 Jur. 300.

Voluntary settlement of (*inter al.*) a sum of £2,000 which was therein recited to have been paid to the trustee. The £2,000 had not in fact been paid, but the trustees executed the settlement on the faith of a promise by the settlor to pay it. *Held*, that neither the trustee of the settlement nor a volunteer under it could enforce payment ; *Marler v. Tommas*, 1 R. 17 Eq. 8.

As to the effect of an ambiguous recital in connection with the doctrine of constructive notice, see Dārt (5th ed.) 864, 876 ; and as to a recital relieving a purchaser from ascertaining payment of debts and legacies charged, see *Storrey v. Walsh*, 18 Beav. 559.

CHAPTER XI.

CONSIDERATION. RECEIPT.

Proof of consideration not stated in the deed : Dealings with wife's land : Voluntary conveyance of leaseholds : Consideration stated in deed to be paid by A. really paid by B. : Consideration necessary for raising a use : Covenants to stand seised : Effect of receipt in body of deed, and of endorsed receipt.

Rule 39.—If the consideration is stated inaccurately, or is not stated at all, or if part only of the consideration is stated, evidence is admissible to prove the true consideration, so as it be not inconsistent with the consideration expressed in the deed.

Proof of consideration not expressed in deed.

“ An averment shall not be allowed and taken against a deed, that there was no consideration given, when there is an express consideration upon the deed, yet when the deed expresseth no consideration or saith ‘for divers good considerations,’ or the like, there an averment of a good consideration given shall be received, for this is an averment that may stand with the deed ;” Shep. Touch. 510, and see 1 Dav. Prec. (4th ed.) 68.

“ A use cannot be raised by any covenant or proviso or by bargain and sale, upon a general consideration ; and therefore if a man by deed indented, and inrolled according to the Statute, for divers good considerations, bargains and sells his lands to another and his heirs, *nihil operatur inde*, for no use shall be raised upon such general consideration, for it doth not appear to the Court that the

bargainor hath *Quid pro quo*, and the Court ought to judge whether the consideration be sufficient or not; and that cannot be when it is alleged in such generality. But note, reader, the bargainee in such a case may aver that money or other valuable consideration was paid or given; and if the truth be such, the bargain and sale shall be good. So, if I by deed covenant with J. S., for divers good considerations, that I and my heirs will stand seised to the use of him and his heirs, no use, without special averment, shall be raised by it; but if J. S. be of my blood, and in truth the covenant was made for the advancement of his blood, he may aver that the covenant was in consideration thereof;" *Mildmay's Case*, 1 Rep. 176a; see also *Bedell's Case*, 7 Rep. 40a:

"The rule is that where there is one consideration stated in the deed, you may prove any other consideration, which existed, not in contradiction to the instrument;" *per Knight-Bruce, V.-C., Clifford v. Turrell*, 1 Y. & C. C. 149.

"The settled rule of law is that you may go out of the deed to prove a consideration that stands well with that stated on the face of the deed, but you cannot be allowed to prove a consideration inconsistent with it;" *per Lord Lyndhurst, C., Clifford v. Turrill*, 9 Jur. 688 (where the authorities are discussed).

"That considerations, not recited in a deed, may be resorted to, to support it, is well settled provided they be not inconsistent with what appears upon the face of the deed;" *per Plunket, C., Nixon v. Hamilton*, 2 Dr. & Wal. 385.

"There is no doubt that evidence is admissible to show that there was consideration for the deed not appearing upon the face of it;" *per Turner, L. J., Townend v. Foker*, L. R. 1 Ch. 459.

It used to be doubted whether, if one consideration appeared on the face of the deed without the words "and divers other considerations," or the like, additional or other consideration could be proved. Lord Hardwicke says (*Peacock v. Monk*, 1 Ves. Sen. 128), "Where

"any consideration is mentioned, as of love and affection only, if it is not said also *and for other considerations*, you cannot enter into proof of any other: the reason is because it would be contrary to the deed; for when the deed says, it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other." But this doctrine must now be considered as overruled.

Examples.—Evidence was admitted to prove valuable consideration where a nominal consideration alone was expressed; *Leifchild's Case*, L. R. 1 Eq. 231; and where a nominal consideration "and divers other good causes and considerations" were expressed; *Chapman v. Emery*, 1 Cowp. 278. Valuable consideration not expressed may be proved.

Where the consideration stated in the deed was not valuable, or even good, evidence was admitted to prove valuable consideration; *Styles v. Attorney-General*, 2 Atk. 152.

Where no consideration was stated, evidence was admitted to prove, in *Ferrars v. Cherry*, 2 Vern. 383, that a settlement made after marriage was really made in pursuance of marriage articles, though this was not stated in the settlement; in *Peacock v. Monk*, 1 Ves. Sen. 127, services done by the donee to the donor; in *Llanelly Railway Company v. London and North Western Railway Company*, L. R. 8 Ch. 942, a pecuniary consideration.

Where the deed was stated to be for valuable consideration, proof of additional valuable consideration was admitted in *Villars v. Beaumont*, Ben. & Dal. 89; S. C. Dy. 146 (Pl. 68) cited at length, 1 Rep. 176a, where evidence was admitted to prove that a deed apparently made for pecuniary consideration was also made in consideration of marriage; in *Vernon's Case*, 4 Rep. 1, where evidence was admitted to prove that a conveyance to a wife on express condition to perform her husband's will was also for her jointure; in *Rex v. Scamonden*, 3 T. R. 474, and *Clifford v. Turrell*, 1 Y. & C. C. C. 138; S. C. on app., 9 Jur. 693, evidence was

admitted to prove a pecuniary consideration larger than that stated in the deed.

Where the consideration stated in the deed was £150 paid and an acceptance for £300, held that the vendor might show that he had stipulated for a lien for the £300, *Frail v. Ellis*, 16 Bea. 850.

Where the consideration was stated to be natural love and affection, evidence was admitted to prove in *Gale v. Williamson*, 8 M. & W. 405, and *Harman v. Richards*, 10 Ha. 81, a simultaneous deed forming part of the same transaction; and in *Tanner v. Byne*, 1 Sim. 160, the consideration of marriage. See also *Leahy v. Dancer*, 1 Moll. 813.

Where the consideration was stated to be natural love and affection "and divers other good causes and considerations," evidence was admitted to prove in *Bayspoole v. Collins*, L. R. 6 Ch. 228, pecuniary consideration; in *Pott v. Todhunter*, 2 Coll. 76, a state of things amounting to valuable consideration; in *Thompson v. Webster*, 4 Drew. 628; S. C. 4 De G. & J. 600, in *Dom. Pro.*, 7 Jur. N. S. 531, a family arrangement, which amounted to valuable consideration.

Where valuable consideration is expressed, natural love, &c., cannot be proved.

Where a deed is expressed to be made for pecuniary consideration, evidence of natural love and affection would apparently not be admissible, for if this were the case, no deed made between relations could ever be upset on the ground of inadequacy of consideration, *Clarkson v. Hanway*, 2 P. Wms. 208.

In *Filmer v. Gott*, 4 Br. P. C. 230, evidence was admitted to prove that the consideration of natural love, &c., stated in the deed did not exist, notwithstanding that the parties were relations.

Post-nuptial settlement.

In connection with the subject it may be observed that a post-nuptial settlement of the wife's land, whereby the interests of the husband and wife are modified, was not, prior to the Married Woman's Property Act, 1882, voluntary; *Hewison v. Negus*, 16 Beav. 594; *Atkinson v. Smith*, 3 De G. & J. 186; *Teasdale v. Braithwaite*, 4 Ch. D. 85; S. C. 5 Ch. D. 630; *Foster v. Lister*, 6 Ch.

D. 87 (in which case *Goodright v. Moses*, 2 W. Bl. 1019, *Currie v. Nind*, 1 My. & Cr. 17, *Butterfield v. Heath*, 15 Beav. 408, were disapproved of).

It may also be observed that a conveyance in form voluntary of leaseholds is necessarily a conveyance for value within 27 Eliz. c. 4, owing to the liability on the part of the assignee to pay the rent and perform the covenants of the lease; *Price v. Jenkins*, 5 Ch. D. 619; *Ex parte Doble*, 26 W. R. 407; but is not within the exception in the Bankruptcy Act, 1869, s. 91, or the Act of 1883, s. 47; *Ex parte Hillman*, 10 Ch. D. 624; and is not a conveyance for value within 13 Eliz. c. 5; *Re Ridley*, 22 Ch. D. 74.

Conveyances of leaseholds or gifts for life or entail of freeholds.

Although if a man make a conveyance in fee simple without consideration there is a resulting use to him, still if he make a conveyance without stating any consideration for life or in tail no use results to him during the estate for life or in tail, as the tenancy created is a sufficient consideration; Shep. Touch. 522, Vin. Uses, 188.

Rule 40.—A mere statement in the deed that the consideration was paid by A. does not exclude evidence that it was paid by B.; *Rex v. Llanyunnon*, 2 B. & Ad. 616.

Proof admissible to show by whom consideration was paid.

Rule 41.—A use cannot be raised without the consideration of money, money's worth, blood, or marriage.

Consideration necessary to raise use.

Examples.—Thus a use was not raised by the consideration of "being ancient acquaintances or chamber-fellows;" *Ward v. Tuddington*, 2 Rol. Ab. 783, Pl. 5; "having been schoolfellows together;" 2 Rol. Ab. 783, Pl. 6; change of name, *Garnish v. Wentworth*, Cart. 137; *Sir Christopher Hatton's Case*, Vin. Ab. Uses, H. pl. 8.

In a covenant to stand seised to uses limited to a stranger, whether in possession, *Lord Paget's Case*, 1 And.

263, Pl. cclxx. (see a case put by Rede, J., 21, H. 7, 19), or in remainder, *Wiseman's Case*, 2 Rep. 15a, even if the stranger be a trustee to preserve, *Whaley v. Tankard*, 2 Lev. 52, or a bastard, Co. Lit. 123a; *Gerrarde v. Worseley*, Dy. 874a, S. C. 1 And. 75, are void, because he is not within the consideration.

A power which takes effect as the declaration of a use is void if contained in a covenant to stand seised because the consideration of blood, &c., does not extend to the persons in whose favour the power is exercised. Thus a general power of appointment in a covenant to stand seised was held bad in *Goodtitle and Pettoe*, Fitzgib. 299; S. C. 2 Str. 934; *Warwick v. Gerrard*, 2 Vern. 7, where it was held that the power was bad in equity as well as at law.

A general power to grant leases contained in a covenant to stand seised was held bad in *Mildmay's Case*, 1 Rep. 175a; *Cross v. Faustenditch*, Cro. Jac. 180; *Chute v. —*, 1 Lev. 80; S. C. sub nom. *Lady Dacres v. Hazel*, 1 Keb. 34; *Prince v. Green*, cited 1 Ca. Ch. 161; *Baynes v. Belson*, T. Ray. 247; but *query*, what would be the effect of a power to grant leases or to make a jointure in favour of a person named in the deed who was within the consideration of blood? See Sugd. Powers (8th ed.) 139; *Goodtitle and Pettoe*, Fitzgib. 299; S. C. 2 Str. 934.

A general power of revocation can be reserved in a covenant to stand seised; Co. Lit. 237a; Shep. Touch. 525.

It is now settled, contrary to the earlier opinion, *Smith v. Risley*, Cro. Car. 529, that a covenant with strangers to stand seised to the use of persons within the consideration is good; *Thorne v. Thorne*, 1 Vern. 141; see the pleadings at length, 2 M. & W. 512, note.

Uses can be raised by covenant in favour of the husband or wife, or the husband or wife hereafter to be taken, of a relation; 2 Roll. Ab. 783 pl. (1), 784 pl. 2, 3, 4.

not before 1882 conclusive in equity, but was before the Supreme Court of Judicature Act, 1873, came into operation (*i.e.*, the 1st November, 1875), conclusive at law, that the purchase-money was paid. But the receipt in the body or endorsed on the deed made since 1881 is conclusive in favour of a subsequent purchaser without notice: see the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41, s. 55).

Examples.—In *Harding v. Ambler*, 3 M. & W. 279, At law. where by a miscalculation less than the whole purchase-money was paid, but the receipt was for the whole; in *Rowntree v. Jacob*, 2 Taunt. 141, where the circumstances were full of suspicion; and in *Baker v. Dewey*, 1 B. & C. 704, the receipt was held to estop the vendor at law from denying that the purchase-money had been paid.

On the other hand, in *Coppin v. Coppin*, 2 P. W. 291, In equity. *Hawkins v. Gardiner*, 2 Sm. & G. 441, *Winter v. Ld. Anson*, 3 Russ. 488, and *Wilson v. Keating*, 27 Beav. 121, the vendor was allowed to prove in equity that the purchase-money had not been paid.

Even at law evidence is admissible that the purchase-money has been returned; *Baker v. Dewey*, 1 B. & C. 704. Purchase-money returned.

The receipt may be qualified by a recital.

In *Lampon v. Corke*, 5 B. & Ald. 606 (S. C. sub nom. *Lambourne v. Cork*, 1 D. & R. 211), the recital being of an agreement to pay, and not of an actual payment, and the consideration being "the said sum of £40 being now so paid to the sd — as hereinbefore is mentioned," and the receipt being "the payment of which sd several sums of money they the said — do hereby admit," it was held that the receipt either had reference to some nominal considerations mentioned in the deed, or that it was qualified by the recital so as not to estop the vendor from deny-

ing that it had been paid. See this case discussed and followed (by a majority of the Court) in *Bottrell v. Summers*, 2 Y. & J. 407.

Evidence may be given even at law to show some matter happening after execution which prevented the payment; as in *Deverell v. Whitmarsh*, 5 Jur. 968, where the consideration was paid by cheque, and the deed contained the usual receipt in the body of the deed and on the back. On the cheque being dishonoured, it was argued that the receipt was conclusive to show that the money was actually paid; but Tindal, C. J., said, "Not at all. The parties may show what occurred at the time. Suppose the man put his hand on the table and took the money back?" and it was held that evidence of the dishonour of the cheque might be given.

Endorsed Receipt.

In *Kennedy v. Green*, 3 Myl. & K. 699, the unusual position of an endorsed receipt was considered to give notice that a fraud had been committed; in *Greenslade v. Dare*, 20 Beav. 284, it was held (in the then state of the law now altered by the Conveyancing and Law of Property Act, 1881, s. 55), that though the absence of the endorsed receipt from a purchase deed put the purchaser on inquiry as to whether the purchase-money had been paid, it did not give constructive notice of any other irregularities in the purchase. See also *Barnhart v. Greenshields*, 9 Moo. P. C. C. 18.

CHAPTER XII.

PARCELS.

General and special descriptions explained: "Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram": "Falsa demonstratio non nocet": "Ejusdem generis": Leaseholds or copyholds passing by assurance of freeholds: Soil of public road, of private road, of river: Party wall: Creation of easement and profit à prendre.

THERE is much difficulty in understanding the rules (General name. for the interpretation of parcels. The following remarks may, perhaps, render them more intelligible.

A thing is always designated by (1) what is called a general name (that is, a name which is equally applicable to every member of a class) together with (2) some super-added description to show which member of the class is intended.

"A house," "an estate," "a farm," "a wood," are all general names; each of them equally fits every member of a class.

There are two modes of designating or identifying any particular member of a class.

First, we may describe the thing by several general names; in other words, we may describe it as belonging to several classes. In this case, if only one thing satisfies all the descriptions, that is the thing meant; if more than one thing satisfies all the descriptions, there is a case of equivocation. Description by general names only.

It often happens that the same thing can be described by two totally different descriptions; *e.g.*, the same lands

may be described by the two descriptions following: "the tithe-free lands in the parish of E.," and "the ancient woodlands inherited by A."

In each of these descriptions all the names are general, and in each case if we omit any one of the general names we describe a larger number of things than if we use all the names; in other words, where a thing is described by several general names, the descriptions are mutually restrictive.

Description
by general
name and
special de-
scription.

Secondly, we may add to the general description either the individual name, if there be one, or a special description which fits that member only of the class of things designated by the general description. Thus, the pieces of land before described may be described as "the woods called Highhurst," or "the woods in the occupation of A." More commonly, however, we add to the general description both the individual name and special description, as "the ancient woodlands in the parish of E., known as Highhurst, in the occupation of A."

It will be observed that if a description, though general in form, does in fact designate one thing only, the addition of any special description is useless; but if, as usually happens, a general description points equally at more than one thing, the special description indicates which of these things is meant; in other words, if anything exists which satisfies both the general and the special description, that only is intended, *i.e.*, the special description restricts the general description.

Inaccurate
description.

It sometimes happens that, while the description renders it certain what is intended, as "A.'s house in London," where A. has only one house there, some further description is added which is wholly or partially inaccurate. Suppose that A.'s house is in the occupation of B., and we describe it as "A.'s house in London, in the occupation of C." Now if A. has no house in London in the occupation of C., we see that the words "in the occupation of C." are inaccurate, and we should reject them.

In a simple case like the one just mentioned there is little difficulty; but cases occur in which part of the

description designates all the parcels in such a manner that if that part stood alone it would be accurate, but the other words of the description apply to a part only of the parcels, so that it remains doubtful whether these latter words are intended to restrict the other part of the description, or are to be rejected as inaccurate. Thus, if A. has estates known as "the T. estates," in the adjoining counties of Hants and Wilts, the description "A.'s T. estates in the county of Hants," would clearly be intended to pass only that part of the property which is situated in Hants; in other words, the phrase "in the county of Hants" would be restrictive. But if A. had a house called S., standing in the two counties, the description "A.'s house called S., in the county of Hants," would clearly be intended to pass the whole house called S.; in other words, the phrase "in the county of Hants" would not be restrictive; the only reason for introducing it is to help to point out which house is intended. It would be more difficult to determine what is meant by "Brosley Farm, in the county of Hants," if the farm were partly in Hants and partly in Wilts.

A collective name, or noun of multitude, is the name Collective name. of a group of things, not necessarily of the same nature, thus, "an estate," may include corporeal and incorporeal hereditaments of any nature; "a farm" includes a house, arable and pasture lands. One superadded description will generally denote the particular group intended, as "A.'s estate," and a further description may either, *first*, show that some members of the group are alone intended, as "A.'s estate in the county of H.," where A.'s estate lies in the counties of H. and W.; "A.'s adult issue," where "issue" is a collective term; the description "A.'s" shows which of the smaller groups included in the larger group "issue" is to be taken, and "adult" shows that only a part of the smaller group denoted by "A.'s issue;" is to be taken; or, *secondly*, it may be intended as a further designation of the particular group as "Brosley Farm in the occupation of A."

Though the three following rules have often been laid

down, there is so much difficulty in applying them, mainly owing to the fact that words descriptive of occupation, locality, and the like are sometimes used as general names, *i.e.*, as restrictive words, in which case they cannot be rejected, and sometimes as words of special description, in which case if they do not fit the thing or all the things described by the rest of the description, they must be rejected, that I consider it convenient to state all the rules before I proceed to the analysis of the cases.

Where the descriptions are all general or collective.

Rule 43.—Where the parcels are described by several general descriptions or by a collective and a general description, that only is intended which satisfies each description.

This rule may also be stated in each of the following modes:—"General descriptions are mutually restrictive;" "If the parcels are described as being members of more than one class, that only is intended which is a member of each class."

Where the special description fits the general.

Rule 44.—Where the parcels are described by general or collective and also by special descriptions, and anything fits both descriptions, that only is intended; *Wrotlesley v. Adams*, Plow. 191.

These two rules are often expressed as follows:

"Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram."

"The rule means that if it stand doubtful upon the words whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood. If, therefore, there is some land wherein all the demonstrations are true, and some wherein part are true and part false they shall be in-

tended words of true limitation to pass only those lands wherein all the circumstances are true ; " *per* Alderson, B., *Morrell v. Fisher*, 4 Ex. 604.

"Quando carta continet generalem clausulam, posteaque descendit ad verba specialia, quæ clausulæ generali sunt consentanea, interpretanda est carta secundum verba specialia. The same rule almost word for word is put and agreed on both sides in 7 Ed. 3, 10a, *Margery Mortimer's Case*, *sc.*, 'Where a deed speaks by general words and afterwards descends to special words, if the special words agree to the general words, the deed shall be intended according to the special words ; as if a man grants a rent *in manerio de D. percipiend* in 100 acres of land, parcel of the same manor, with clause of distress in the 100 acres, the rent shall issue out of the 100 acres only, and the general words shall be construed according to the special words ' ; " *Altham's Case*, 8 Rep. 154b.

In cases falling within this rule it will generally be found that there is only one special description, as "A.'s house," "Brosley Farm ;" if there are several special descriptions and each of them denotes the same thing, as "Brosley Farm, which is delineated in the map annexed hereto," where the map accurately describes Brosley Farm, the rule applies, but if they do not both denote the same thing the next rule applies.

Rule 45.—Where the parcels are described by both general or collective and special descriptions, and nothing exists which satisfies all the descriptions, but something exists which satisfies some of them, and is described with sufficient certainty, the others may be disregarded. Falsa demonstratio non nocet.

In cases falling within this rule it will generally be found that there is more than one special description, though of course there *may* be only one special description, as in *Roe d. Conolly v. Vernon*, 5 East, 51 (*infra*,

p. 169), where the statement of the rent was the only special description.

The rule is sometimes stated as follows:—"If there be a description of the property sufficient to render certain what is intended, the addition of a wrong name, or of an erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars, will have no effect."

"One of the rules of construction is '*falsa demonstratio non nocet*,' which means that if there be an adequate and sufficient description with convenient certainty of what was meant to pass, a subsequent erroneous addition will not vitiate it;" *per* Alderson, B., *Morrell v. Fisher*, 4 Ex. 604.

"Whenever there is in the first place a sufficient certainty and demonstration, and afterwards an accumulative description, and it fails in point of accuracy, it will be rejected;" *Shep. Touch.* 247.

"The rule is clearly settled, that when there is a sufficient description set forth of premises by giving the particular name of a close, or otherwise, we may reject a false demonstration;" *per* Parke, J., *Doe d. Smith v. Galloway*, 5 B. & Ad. 51.

"As soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it;" *per* Parke, B., *Llewellyn v. Earl of Jersey*, 11 M. & W. 189; adopted *per* Monahan, C.J., in *Dublin & Kingstown Railway Co. v. Bradford*, 7 Ir. C. L. Rep. 69.

"There is a diversity where a certainty is added to a thing that is incertain (*i.e.*, described by a general name) and where to a thing certain. For if I release all my right in all my lands in *Dale* which I have by descent on the part of my father, and I have lands in *Dale* by descent on the part of my mother, but no lands by descent on the part of my father, there the release is void, for if the releasee will aid himself by the release he ought to aver that I had such lands in *Dale* by descent on the part of

my father, to which the release extended, and the same is issuable, and if he cannot aver this, then the release is void.' And so the words of the certainty—viz., which I have by descent on the part of my father—being added to the general words which were uncertain, are of effect. But if the release had been in *White-acre* in *Dale*, which I have by descent on the part of my father, and I had it not by descent on the part of my father, but otherwise, yet the release is good, and the releasee shall not be compelled to take any averment, for the thing was certainly expressed by the first words, in which case the addition of another certainty is not necessary but superfluous, and therefore he shall not there take an averment upon a thing which is of no effect, be the same true or false ;" *Wrotesley v. Adams*, Plowd. 191.

The distinction taken in the above passage is well pointed out in the marginal note to *Roe d. Conolly v. Vernon and Vyse*, 5 East, 51, as follows:—"Where there is a grant of a *particular* thing once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation mistaken or false respecting it will not frustrate the grant; but where a grant is in *general* terms, there the addition of a particular circumstance will operate by way of restriction and modification of such grant." And see *per* Lord Cranworth in *Slingsby v. Grainger*, 7 H. L. C. 283 :—"The distinction is between those cases in which there has been a complete description of the thing given, and a subsequent misdescription as to some particular connected with it, and cases in which that which is subsequently connected with the description is so connected as to form part of the description of the thing given." And *per* Lord Westbury in *West v. Lawday*, 11 H. L. C. 384. See also Bacon's Law Tracts, Rule 13, cited by Stuart, V.-C., in *Pedley v. Dodds*, L. R. 2 Eq. 819, at p. 824.

Examples of words construed as restrictive. — Examples of
Grant of "all those messuages, &c., in the occupation of B., in the city of W., formerly belonging to the hos-
Name of place, rules 43 and 44.

pital of W." *Held*, that lands in the occupation of B., which formerly belonged to the hospital of W., but were not within the city of W., did not pass: *Doddington's Case*, 2 Rep. 32b; S. C. sub nom. *Hall v. Peart*, Pop. 60.

A conveyance contained a full and accurate description of the "Dromardmore" estate, containing 1085 acres, "and described in the annexed map." The annexed map was proved to comprise several acres of land which formed no part of Dromardmore, but were part of Dromardbeg. *Held*, that the first description should prevail, and that nothing passed by the deed which was not part of Dromardmore; *Roe v. Lidwell*, 11 Ir. C. L. Rep. 320. See also to the same effect, *Dublin & Kingstown Railway Co. v. Brudford*, 7 Ir. C. L. Rep. 57. See also *Griffiths v. Penson*, 1 N. R. 380, *post*, p. 161.

Occupancy.

R., tenant for years of the farm called C., consisting of H. and other parcels, appoints A. his executor and dies. A. demises all except H. to B., and H. to F., and afterwards grants the residue of his term in the whole to B. and F. The reversioner grants a rent issuing out of all his lands and tenements commonly called C., formerly in occupation of R., and now *in the tenure and occupation of B.* *Held*, that H. was not charged with the rent; *Oguel's Case*, 4 Rep. 48b.

Demise of "all my house and two yard-lands in B. in the possession of G.;" G. was in possession of all except two acres. *Held*, that the two acres did not pass; *Bartlett v. Wright*, Cro. El. 299. (It should be remembered that a yard-land consists of a number of detached strips.)

Demise of "all that messuage, &c., on the south side of Speenham land, called the Old Fighting Cocks, now or late in the occupation of J." The question being whether the demise included the soil of a gateway under a portion of the messuage, leading to a yard behind it, in which were some small houses not included in the demise, the tenants of which had always used the gateway, it was held that in the absence of evidence that the soil of the gateway had been in the exclusive occupation of J., it did

not pass by the demise ; *Dyne v. Nutley*, 14 C. B. 122. Williams, J., remarked that the words "now or late in the occupation of J." were essential words and not mere words of demonstration.

Settlement of "all that messuage or dwelling-house, ^{Enumeration,} with the lands, &c., thereto belonging, situate, &c., and now or late in the occupation of B., his under-tenants or assigns, and which said messuage, dwelling-house, and lands are also known or described by the names, and contain the several quantities by admeasurement, following, that is to say, &c." Then followed a list of the names and acreages of the several closes contained in the farm, with the omission of four. *Held*, that although the whole farm, including the four closes, had been let to B. at one rent, the four closes not mentioned in the settlement did not pass ; *Griffiths v. Penson*, 1 N. R. 330 ; S. C. 9 Jur. N. S. 385. See, to the same effect, *Barton v. Dawes*, 10 C. B. 261.

In *Lyle v. Richards*, L. R. 1 K. & Ir. Ap. 222, a boundary Map. line of the premises was described "as a line drawn from A.'s house to a boundstone, situate, &c.," and the description of the parcels was followed by the words "and which said premises are particularly delineated by the map on the back of this settlement ;" the house was incorrectly drawn on the map. *Held*, that the map must be taken as part of the description, and that the boundary line must be taken as drawn on the map. This case will be found fully discussed in Dart V. & P. (5th ed.) 965, where Mr. Dart says : "Lord Westbury dissented from this view, and held that as the error in the plan could not be discovered without the aid of extrinsic evidence, there was a latent ambiguity, which was matter of fact to be determined by the jury on the evidence, not matter of law to be determined on the construction of the deed. A plan is a part of a deed to be interpreted, like every portion of the instrument, by the Judge : but, as was observed by Lord Westbury, the question here was not one of the interpretation of the deed itself, or even of the construction of the description of the parcels, but of the

inference to be derived from a map as to the relative position of two objects, one of which was proved to be erroneously laid down. As soon as that proof was admitted, it became obvious that the true position in nature of the thing erroneously laid down, and the true relative position of the adjoining objects, must both be ascertained by external evidence. The latter seems the sounder view : the construction of the plan was matter of law so long only as its accuracy was unimpeached : being proved to be inaccurate, it became a question of fact what parcels were comprised in the lease : for it did not follow that, because the boundary line was drawn from the north-east corner of the house, as incorrectly represented on the plan, it would have been drawn from the same point, if the true site of the house had been drawn."

Incorporation
of map.

As to incorporation of map in conveyance, see *In re Otway's Estate*, 13 Ir. Ch. R. 222, at 233—234; *Barlow v. Rhodes*, 1 Cr. & Mee. 439. A map attached to but not referred to in a conveyance cannot be used to explain it; *Wyse v. Leakey*, Ir. R. 9 C. L. 384.

Inventory or
schedule.

Assignment by bill of sale to B. of "all the household goods and furniture of every kind and description whatsoever in the house No. 2, Meadow Place, more particularly mentioned and set forth in the inventory or schedule of even date herewith, and given up to B. on the execution hereof." At the time of the execution one chair was delivered to B. in the name of the whole of the goods. The inventory did not mention all the goods in the house. *Held*, that no goods passed except those specified in the inventory; *Wood v. Rowcliffe*, 6 Ex. 407. See *Re Craig*, Ir. R. 4 Eq. 158. But, on the other hand, where all the goods in the grantor's house "which are more particularly described in the schedule hereto," were assigned, it was held that the words in the schedule did not restrict the generality of the words in the body of the deed; *Baker v. Richardson*, 6 W. R. 663.

In *Cort v. Sagar*, 3 H. & N. 370, the words in the schedules were held not to be restrictive under special circumstances.

Where an Act of Parliament giving powers of sale and exchange over estates settled by a former settlement and Act, contained a recital of the objects of the Act restricted in terms to such settled estates, and then vested in trustees all and singular the lands in certain counties limited by the former settlement and Act, which were described in the schedule. *Held*, that lands not included in the former settlement or Act, though described in the schedule, did not pass; *Howard v. Earl of Shrewsbury*, L. R. 17 Eq. 378. See the settlement and Act given at length, *Shrewsbury v. Scott*, 6 C. B. N. S. 1.

Where one having customary tenements, compounded and uncompounded, surrendered to the use of his will "all and singular the lands, tenements, &c., whatsoever in the manor, which he held of the lord by copy of court-roll, in whose tenure or occupation soever the same were, being of the yearly rent to the lord in the whole of £4 10s. 8d. and compounded for;" it was held that the words "compounded for" restrained the operation of the surrender to that description of copyholds then belonging to the surrenderor, and that the words "being of the yearly rent of, &c.," which were not referable to any actual amount of the rents either compounded or uncompounded, though much nearer to the whole than to the compounded only, could not qualify or impugn that restriction; *Roe d. Conolly v. Vernon*, 5 East, 51. Special description.

Cases on Wills.

In the following cases, all decided on the construction of wills, the words in *italics* have been held restrictive. Words held restrictive.

Devise of "all his freehold and real estates whatsoever situate *in the city of Limerick*;" *Miller v. Travers*, 8 Bing. 244; "All my freehold, copyhold, and leasehold messuages lands and hereditaments *in the city of Hereford or the liberties thereof* in the county of Hereford;" *Moser v. Platt*, 14 Sim. 95; "All which said hereditaments *in the county of Hants* are hereinafter described or referred Words of locality.

to as my 'Tedworth estate ;" *Webber v. Stanley*, 16 C. B. N. S. 698 ; " All the freehold, copyhold, and leasehold lands, tenements, and hereditaments to which I may be entitled at the time of my decease *situate in the parish of Crowhurst ; Evans v. Angell*, 26 Beav. 202 ; " All and every his messuages, lands, tenements, tithes, and tithe commutation rent-charge *lying and being within the manor and parish of Goulceby ; Lister v. Pickford*, 34 Beav. 576 ; " Leasehold property, *situate at C. in the parish of S. ; Attwater v. Attwater*, 18 Beav. 330 ; " All and singular my freehold messuages or tenement lands and hereditaments *situate at K. ; Pogson v. Thomas*, 6 Bing. N. C. 337 ; " Messuage or tenement farm lands and premises with the appurtenances *situate, lying, and being at A. in the parish of B. ; Doe d. Tyrrell v. Lyford*, 4 M. & S. 550. " All the estate and interest whatsoever which I have or can claim either in possession or reversion of or in any lands, tenements, or hereditaments *at C. ; Doe d. Browne v. Greening*, 3 M. & S. 171 ; " All and every my messuages, tenements, or dwelling-houses and buildings *situate and being at, in, or near a street called S. ; Doe d. Ashforth v. Bower*, 3 B. & Ad. 453 ; " Messuages, cottages, manufactory and land *on the west side of High Street ; Smith v. Ridgway*, L. R. 1 Ex. 46, 331.

Occupancy.

" All the messuages, tenements, lands, grounds, hereditaments, and premises *situate at T., and now in my own occupation ; Doe d. Parkin v. Parkin*, 5 Taunt. 321 ; " All that capital messuage or tenement and farmhouse . . . and *inter alia* woods, woodlands . . . commonly called T., in the parish of E. *in the occupation of W.*" (the woods in hand did not pass) ; *Whitfield v. Langdale*, 1 Ch. D. 61 ; " All my lands situated at G., *now or late in the occupation of S. ; Homer v. Homer*, 8 Ch. D. 758 ; " All those two cottages or tenements, *the one occupied by A. and the other by B.*" (the facts were very special) ; *Doe d. Hubbard v. Hubbard*, 15 Q. B. 227.

Tenure.

" All that *freehold* farm called W., containing 200 acres or thereabouts, occupied by W. ;" *Hall v. Fisher*, 1 Coll. 47 ; " All and every my *freehold* hereditaments

and estate in the county of Surrey;" *Quennell v. Turner*, 18 Beav. 240; "All that my *frechold* estate at or near B. which I purchased of W.;" *Emuss v. Smith*, 2 De G. & S. 722. "All my *copyhold* estates in C.;" *Doe d. Brown v. Brown*, 11 East, 441.

"Subject to a mortgage;" *Pullin v. Pullin*, 10 J. B. Moo. Miscellaneous.
464; S. C. 3 Bing. 47 (a); "*Which I have surrendered to the use of my will*;" *Gascoigne v. Barker*, 8 Atk. 8.
"All freehold and copyhold . . . hereditaments . . . whereof I shall die seised or possessed the copyhold part *whereof I have surrendered to the use of my will*;" *Wilson v. Mount*, 3 Ves. 191; "*Which I became entitled to on the decease of my father*;" *Doe d. Ryall v. Bell*, 8 T. R. 579.

Examples of rejection of words fitting part only of the property.—Conveyance of all that part of the Bog of *Allen and Clunagh* situate in the barony of Carbery and county of Kildare containing 777 acres 3 rods 24 poles, as described by a map annexed hereto." It turned out that part of the land described by the map amounting to 20 acres 3 rods 6 poles formed part of the Bog of Muckland, not of Allen and Clunagh. *Held*, that the whole of the land described in the map passed. Willes, J., in delivering the opinion of the Judges, said, "The words of the conveyance, taken in connexion with the map, which is referred to, and made part of it, are sufficient to describe the land in question, and to express an intention to convey it. The omission to describe the land by the name of '*Muckland*,' and even the description of it as within another denomination, amount at most to an erroneous additional description of that which is identified beyond doubt by reference to the map, *constat de corpore*;" *Rorke v. Errington*, 7 H. L. C. 617, at p. 625.

Examples of
rule 45.
Name.

If one grant in this manner "all my meadow in D., Quantity.

(a) Here the words "subject to a mortgage" were contained in a recital, not in the description itself; see *Doe d. Beach v. Jersey*, 1 B. & Ald. 550.

containing 10 acres," whereas in truth his meadow there doth contain 20 acres, it seems this is a good grant for the whole 20 acres;" Shep. Touch. 248; *Willoughby v. Foster*, Dy. 80b.

Demise of "all that part of the townland of B., containing 509 acres, arable, meadow, and pasture, English statute measure, for three lives renewable for ever, bounded by" certain specified boundaries. *Held*, to pass 400 acres of bog and land reclaimed from bog lying within the same boundaries in addition to the 509 acres; *Jack v. M'Intyre*, 12 Cl. & Fin. 151; S. C. 3 Ir. L. R. 140; 5 Ir. L. R. 229.

A conveyance was made by reference to a schedule, and the portion of the schedule which related to the parcel in question stated it in the first column, which was headed, "No. on the plan of the *Briton Ferry Estate*," to be "153b;" in the second column, under the heading "Description of Premises," it was stated to be "a small piece marked on the plan;" in the third, it was described as being in the occupation of J. E.; and in the fourth, as containing 34 perches. The piece 153b, as marked on the plan, contained 27 perches only. *Held*, that the description in the plan must prevail, the acreage being rejected as *falsa demonstratio*; *Llewellyn v. Earl of Jersey*, 11 M. & W. 183. "The portion conveyed is perfectly described, and can be precisely ascertained, and no difficulty arises except from the subsequent statement that it contains 34 perches. That, however, becomes merely a false description of that which is conveyed with convenient certainty before. It is a mere *falsa demonstratio*, and does not affect that which is already sufficiently conveyed;" *per* Parke, B., at p. 189; S. C. 12 L. J. Ex. 248.

Boundaries.

"Then it is described as bounded on the east by (*inter alia*) the defendant's property. But this general description of the boundaries does not cut down the effect of the prior description. When, after a description of a property, it is stated that on one side it is bounded by a certain other property, and it appears that it is not so bounded for every inch, there is an inaccuracy in the

statement of the boundary, but this is not enough to exclude what is not so bounded, if it appears from the evidence to have been part of the property dealt with, and the previous description of that property is sufficient to include it;" *per* Jessel, M.R., *Francis v. Hayward*, 22 Ch. D. 181.

If one grant in this manner "All my manor of W., late ^{Occupancy.} parcel of the possession of the Abbot of S., and *late in the possession of K.*," and in truth it was never in the possession of K.; this grant is good notwithstanding;" *Shep. Touch.* 247.

Lease of "All their farm in B. *in the occupation of W.*" "The lease is of all their farm in B., which word (*farm*) is a capital messuage, and all the lands lying to it, and signifies the chief house and the lands belonging to it, and not a common house, and so has a certainty in itself. And when it goes further and says, *in the tenure and occupation of W.*, this is of no effect, for if it was not in his tenure and occupation, yet it should pass, for there is a certainty in the thing demised, viz., the farm in B., and so another certainty put to a thing which was certain enough before, is of no manner of effect;" *per Cur.*, *Wrotesly v. Adams*, *Plow.* 191.

A man having lately purchased a house in D. of T. C., and having no other house in D., made a conveyance thereof by the description, "the messuage lately of R. C. in D.;" *Held*, that it passed; *Windham v. Windham*, *Dy.* 376b. See also *Shep. Touch.* 247, 248.

Demise of "all that glebe land lying in A., viz., 78 acres of land, and also the tithes of the said 78 acres, all which lately were *in the occupation of P.*" It appeared that P. had never been in occupation of the tithes. *Held*, nevertheless, that they passed by the lease; *Smyth v. Eyres*, *Cro. Car.* 546; S. C. sub nom. *Vicars Choral de Litchfield v. Ayres*, *W. Jones*, 435.

Where the words of a deed were sufficient to pass all the property comprised in a former deed, but the description of occupancy was incorrect, the property passed; *Wilkinson v. Malin*, 2 Cr. & J. 636; S. C. 2 Tyr. 544.

Lease of "All that part of the park called B., situate and being in the county of O. and now in the occupation of S.," lying within certain specified abuttals, together with the houses belonging thereto, "and which now are in the occupation of S." *Held*, that a house on a part within the abuttals, but not in the occupation of S., passed; *Doe d. Smith v. Galloway*, 5 B. & Ad. 43; S. C. 2 Nev. & M. 240.

A house was demised to A. except the roof, which the landlord retained and soon afterwards demised to the owner of the adjoining house. After the determination of the lease to A., the landlord demised the house by the description of "all that shop, situate at, &c., as the same was late in the occupation of A." *Held*, that the words, "as the same was late in the occupation of A.," were inserted for the purpose of identification only, and not of restricting the property which passed, and accordingly that the roof passed; *Martyr v. Lawrence*, 2 De G. Jo. & S. 261 (cf. *Baird v. Fortune*, 4 Macq. 127).

Locality (a).

"If a parish lie in two counties, viz., *Berks* and *Wilts*, and one grant in this manner, 'all his close called *Callis* in the parish of *Hurst* in the county of *Berks*,' and in truth the close doth lie in the county of *Wilts*; this is a good grant to pass the close" (this case is put in *Bacon's Law Tracts*, Rule 13, cited L. R. 2 Eq. 824). . . . "If

Vill and parish distinguished. (a) It is necessary to bear in mind the distinction between a parish and a vill; Co. Litt. 115b, 125a; *Addison v. Otway*, 1 Mod. 250; 2 Mod. 233 (at 237); *Stoke v. Pope*, 2 Roll. Ab. 54; 4 Cru. Dig. Tit. 32, Ch. 21, ss. 32, 33.

It appears that a conveyance of all a man's lands in a named parish, or in named liberties, will pass his lands in every vill in that parish or liberties; *Waldron v. Ruscarii*, 1 Vent. 170; *Lever v. Hosier*, 2 Mod. 47; but that on the other hand a conveyance of all a man's land in A., where there is both a parish and a vill of that name, will pass only the lands in the vill; *Stork v. Fox*, Cro. Jac. 120; S. C. sub. nom., *Stoke v. Pope*, 2 Roll. Ab. 54. See also 2 Roll. Ab. p. 54, pl. 31.

Where the parish and a vill in it bear the same name, they will be presumed, till the contrary be proved, to be coextensive; *Gibson v. Clark*, 1 Ja. & W. 159.

If a place be named generally, it is *prima facie* a vill; *Vinkeston v. Eblen*, cited 2 Salk. 501, unless it be the place where a deed is made, when it is *prima facie* a house; *Ward's Case*, Latch. 4; S. C. sub nom. *Ward v. Kidswin*, Latch. 77.

the grant be in this manner, 'All that my house in the occupation of J. S., in *St. Andrew's* parish,' whereas in truth it is in the parish of K., but in the occupation of J. S., it seems this grant is good to pass the house;" *Shep. Touch.* 247.

"No man can doubt the intent of this deed to pass those lands; it has conveyed so many acres in the possession of A., B., and C., the name of the parish only is mistaken. . . . Why did the parties mention the parish at all in the deed? it was unnecessary;" *Lambe v. Reaston*, 5 Taunt. 207; S. C. 1 Marsh. 23: but see *Catterel v. Franklin*, 6 Taunt. 284.

Demise of all minerals in, upon, or under all or any Map, part of certain hereditaments "described and set forth in the map hereunto annexed, and also in, upon, or under all or any part of M., all which premises are situate in the townships of, &c., and are bounded, &c., and contain together 1400 acres of land or thereabouts, all which are particularly described, delineated, and distinguished in the map or plan thereof annexed to these presents, and which by the agreement of all the said parties hereto is meant and intended to be taken as part of this indenture." *Held*, on a dispute arising as to the boundary, and the map being on so small a scale that it was impossible that it could ascertain the boundary with sufficient precision, that the words of the demise were not to be controlled by the map; *Taylor v. Parry*, 1 Sco. N. R. 576; 1 Man. & Gr. 604, at 615, foll.

Cases of erroneous enumeration must be carefully distinguished from cases where the first description, being Erroneous enumeration. general in character, is restrained by the subsequent enumeration of the particulars, as in *Griffiths v. Penson* and other cases cited *ante*, p. 161. Bargain and sale of all his woods, underwoods, &c., standing, &c., in the whole of his manor of C., viz., In all his wood called E., and in all his wood called F. *Held*, that woods in C., not being any of the woods afterwards expressly named, passed by the conveyance; *Stukeley v. Butler*, Hob. 168.

See as to an erroneous enumeration not cutting down a sufficient description in a will of realty, *Travers v. Blundell*, 6 Ch. D. 436; of personalty, *Dean v. Gibson*, L. R. 3 Eq. 718; *King v. George*, 5 Ch. D. 627; *Re Fleetwood*, 15 Ch. D. 594.

Schedule.

The mortgage of a foundry, with the engines, fixtures, machinery, tools, and working plant therein, described the chattels assigned as being "more particularly enumerated and specified in an inventory of even date herewith, to be signed by the parties hereto, and read and construed as forming part of these presents." The deed contained no mention of stock in trade. The inventory, which was signed by the mortgagors on the same day as the deed, extended over twenty-one pages. The first twenty pages contained a detailed description of the engines and other chattels which were mentioned under general heads in the deed. At the bottom of page 20 was this clause: "The stock-in-trade consists of bolts, brass-work, wrought and cast iron work, brass and other work, both finished and in preparation." And at the top of page 21 were these words: "Also all cast and wrought iron, steel, timber, and all other stock-in-trade, in and upon the before-mentioned foundry, workshops, and premises." Then came this clause: "The contents of the twenty preceding sheets is a complete and exact inventory of the fixtures, machinery, utensils, and things in, upon, or about the foundry mortgaged by us this day." This was immediately followed by the signatures of the mortgagors. *Held*, that the stock-in-trade was not included in the mortgage; *Ex parte Jardine*, L. R. 10 Ch. 322. See also *Dyer v. Green*, 1 Ex. 71, where the schedule was referred to but not annexed.

Miscellaneous.

"If the release had been in *Whiteacre* in *Dale*, which I have by descent on the part of my father, and I had it not by descent on the part of my father, but otherwise, yet the release is good . . . for the thing was certainly expressed by the first words, in which case the expression of another certainty is not necessary;" *Plow.* 191. See also *Plow.* 395; *Shep. Touch.* 247.

Conveyance by husband and wife of all the messuages of them or either of them in certain counties, "all which said hereditaments were heretofore the estate and inheritance of" the wife. *Held*, that the husband's own property passed; *Youde v. Jones*, 14 Sim. 181 (see p. 149).

Cases on Wills.

In the following cases, all decided on the construction of wills, the words in italics which fitted part only of the parcels described by the rest of the description were rejected, *i.e.*, construed as not being restrictive.

"All that and those messuage or tenement houses, Situation. buildings, farm and lands called H. . . . *situate in the parish of L. . . . containing by estimation 80 acres, more or less*, now in the occupation of J.;" *Whitfield v. Langdale*, 1 Ch. D. 61; "All that my share and interest in the lands known by the name of D., *situate in the parish of K., now in the occupation of E.*;" *Hardwick v. Hardwick*, L. R. 16 Eq. 168; "All my messuages, tenements, and lands, *situated at or within D.* in the occupation of F.;" *Homer v. Homer*, 8 Ch. D. 758.

"All that my farm lands and hereditaments called T. Occupation. Farm, *situate within the parish of D., now in the occupation of C.*;" *Goodtitle d. Radford v. Southern*, 1 M. & S. 298; "My farm at B. *in the tenure of J.*;" *Goodtitle d. Paul v. Paul*, 2 Burr. 1089; S. C. 1 Wm. Bla. 255; see *Hardwick v. Hardwick*, L. R. 16 Eq. 168 (given above); "The house or tenement *wherein W. dwelleth*, called the White Swan; *Chamberlaine v. Turner*, Cro. Car. 129; "The corner house in A. *in the tenure of B. and H.*;" *Blague v. Gold*, Cro. Car. 447, 473; "All my messuage or dwelling-house, out-buildings, gardens, lands and appurtenances *in which I now dwell* at H.;" *Nightingall v. Smith*, 1 Ex. 879.

"*Containing by estimation 85 acres*;" *Whitfield v. Langdale*, 1 Ch. D. 61 (given above); "All that and those my freehold messuages or tenements, hereditaments and premises with the appurtenances thereunto

belonging, called West Cliff, situate, lying, and being at West Cowes aforesaid, *and now used or occupied as lodging-houses* ;” *Cunningham v. Butler*, 3 Giff. 87 ; “ *Which were given and devised to me by my brother’s will* ;” *Welby v. Welby*, 2 V. & B. 187.

In the following cases the words in italics, which did not fit anything belonging to the testator, were rejected.

Tenure.

“ *Freehold* houses in Aldersgate Street ;” *Day v. Trig*, 1 P. Wms. 286 (Tracy, J., saying that leaseholds could not pass by the description of freeholds in a deed) ; “ *Freehold* lands in parishes of A., B., and C. (testator having no freeholds in B. and C.) ;” *Doe d. Dunning v. Cranstoun*, 7 M. & W. 1 ; “ *Leasehold* ” houses, the testator having, after the date of his will, purchased the reversion in fee ; *Cox v. Bennett*, L. R. 6 Eq. 422 ; *Saxton v. Saxton*, 13 Ch. D. 359.

Observation.—It has been said that when there are two certain descriptions, the first shall necessarily prevail ; but this appears not to be correct.

In *Doutie’s Case*, 3 Rep. 9b, bargain and sale of “ all his tenements in the parish of St. Andrew in Holborn, in the occupation and tenure of W. G.,” was held to pass nothing, as the vendor had nothing in the parish of St. Andrew, though he had property in St. Sepulchre in the occupation of W. G. One of the points resolved was the following :—“ First, that nothing passed by the said bargain and sale, for notwithstanding the latter certainty, *scil.* in the tenure of William Gardiner, was true, yet because the first certainty, *scil.* in the parish of St. Andrew in Holborn, was false, for this cause the bargain and sale was utterly void. But otherwise, had it been, if a true certainty had been in the first place, as if he had bargained and sold, ‘ the tenements, &c., in the tenure of William Gardiner in the parish of St. Andrew, Holborn,’ there it was agreed that the tenements shall pass well enough notwithstanding the addition of the falsity for *utile per inutile non vitiatur*. ”

In commenting on *Dinwatie's Case*, Hobart, J., says (*Stukeley v. Baker*, Hob. 171), "But where it is added in that case that the Court was of opinion, that if he had begun with the tenure of G., which was true, and ended with the parish mistaken, that the grant had been good by the rule *utile per inutile non vitiatur* : I hold it plain contrary ; for the several circumstances and descriptions circumscribe and ascertain the grant. And it is a good rule *incivile est nisi tota sententia perspecta de aliquâ parte judicare* ;" and he cites *Doddington's Case*, 2 Rep. 32, ante, p. 160. See also *Rorke v. Errington*, 7 H. L. C. 617, ante, p. 165 ; *Jack v. M'Intyre*, 12 Cl. & Fin. 151, ante, p. 166 ; *Windham v. Windham*, Dy. 376b, Shep. Touch. 247.

Rule 46.— Where a description of property sufficiently clear to render it certain what is intended is followed by a general description, introduced by the words "and also," or the like, it will be taken that the object of introducing the general description is to guard against any accidental omissions ; and the general description will in most cases be held to comprise such property only as is *ejusdem generis* with that comprised in the specific description.

"It is very common to put in a sweeping clause ; and the use and object of it, in general, is to guard against any accidental omission ; but in such cases, it is meant to refer to estates or things of the same nature and description with those that have been already mentioned ;" per Lord Mansfield, C.J., *Moore v. M'Grath*, 1 Cowp. 12.

"It is a general rule of construction that, where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to

matters *ejusdem generis* with such class ;" *per* Pollock, C.B., *Lyndon v. Standbridge*, 2 H. & N. 51.

Examples.—Lease by a bishop of a manor house, of the site thereof, and of certain particular closes and demesnes, by particular names, and of all other his lands and demesnes. *Held*, that ancient park and copyhold land did not pass by the latter general words ; *Lord North v. Bishop of Ely*, cited 1 Bulst. 100.

A. being seised of a manor and other real estate in the county of M., mortgaged the last-mentioned real estate to B. ; by a subsequent deed he mortgaged to C. "all the hereditaments and premises comprised in the previous mortgage, and all other the lands, tenements, and hereditaments (if any) in the county of M.," of which he was seised : *held*, that the manor did not pass, *Rooke v. Kensington*, 2 K. & J. 753.

The C. property consisted of a mansion house and thirteen fields, and two mills with the lands belonging thereto. The tenant in tail, by deed declaring the uses of a recovery, recited his intention to convey the property thereafter particularly mentioned, and he conveyed "all those the capital mansion house, messuage, or tenement, with the several out-offices, gardens, plantations, and hereditaments thereunto belonging, commonly called or known by the name of C. ; And also those fields, closes, pieces, or parcels of land or ground and hereditaments (eight in number), commonly called or known by the several names, &c. (naming them), being parts and parcels of the demesne lands of C. in the holding or occupation of T. M., together with all and singular houses, out-houses, edifices, buildings, &c., lands, meadows, &c., hereditaments and appurtenances whatsoever, to the said capital messuages, tenements, lands, hereditaments, and premises belonging, or in anywise appertaining, or therewith or with any part or parcel thereof. usually set, let, held, occupied, or enjoyed, or accepted, reputed, taken for, or known (*sic ; qu.*) as part, parcel, or member thereof, or appurtenant thereto, or to

any part or parcel thereof." *Held*, that the previous particular enumeration in the deed confined the operation of the subsequent general words, and that the mansion house and eight fields only passed by the deed; *Doe d. Meyrick v. Meyrick*, 2 Cr. & Jer. 223; S. C. 2. Tyr. 178.

By indentures of lease and release reciting that B. was entitled to a share in specified freeholds and leaseholds, and that he proposed to assign over all his interest in the aforesaid premises, and in such other property situate in Great Britain or Ireland, whether real or personal, as he might at the time of executing the indenture be entitled to, for the benefit of his sisters; B. released his undivided share in specified freeholds to the trustee and his heirs, and assigned to the trustee his undivided share in the leaseholds, "and all other the property situate in Great Britain or Ireland or any part thereof, whether real or personal," to which he was then entitled, upon certain trusts for the benefit of his sisters. B. was at the time of executing the deed entitled to a share of a freehold house not mentioned in the deed. *Held*, that it did not pass, because the general words had reference to the leaseholds only; *Doungsworth v. Blair*, 1 Keen, 795; S. C. 6 L. J. N. S. (Ch.) 263.

Trustees, who had a power to raise money by sale or mortgage, and to manage and receive rents, were directed to apply the "moneys to be raised or received as aforesaid," in or towards payment, &c., of certain mortgage and other debts, and after providing for keeping down the interest on the debts out of "the rents and profits and other moneys in their hands," they were directed to pay an annuity out of the "rents or profits or any other moneys held by them on the trusts of these presents." *Held*, that the annuity was charged on income only, as the words "other moneys" must be restricted according to the rule, and would apply to fines and small things in the nature of income, not being exactly rents and profits; *Clifford v. Arundell*, 27 Beav. 209; S. C. 1 D. F. & J. 307.

Assignment by way of mortgage of "all and every the

household goods and furniture, stock-in-trade, and other household effects whatsoever, and all other goods, chattels and effects, now being, or which shall hereafter be in, upon, or about the messuage, &c., and all other the personal estate whatsoever" of the mortgagor. *Held*, not to pass the lease of the house in which the goods were; *Harrison v. Blackburn*, 17 C. B. N. S. 678.

Assignment to creditors of "all and singular the household furniture, plate, linen, and china, stock-in-trade, goods, and merchandize, debts, sums of money, bills, notes, and securities for money, and all other the estate and effects whatsoever and wheresoever, of or to which A. was then possessed of or entitled." *Held*, not to pass a contingent interest under a will; *Pope v. Whitcombe*, 3 Russ. 124; see also *Re Wright*, 15 Beav. 367.

A lease contained power to the landlord to take possession of any part of the land demised if required by him "for the purpose of building, planting, accommodation or otherwise." *Held*, that the words "or otherwise" were to be restricted to purposes *ejusdem generis*, and therefore did not authorise the landlord to take possession of the land for the purpose of selling it to a railway company; *Johnson v. Edgware, &c., Railway Co.*, 35 Beav. 480.

Reversion
and estate in
possession.

A reversion is *ejusdem generis* with an estate in possession within the meaning of the rule; *Doe d. Pell v. Jeyes*, 1 B. & Ad. 593. But a reversion was held not to pass where if it had passed it would have been *ipso facto* forfeited; *Re Waley*, 3 Drew, 165.

Context.

Observation.—The context may readily show that the rule is not to be applied.

In *Ringer v. Cann*, 8 M. & W. 848, where the words were nearly the same as in *Harrison v. Blackburn*, *ante*,

p. 176, it was held that the lease passed, on the grounds, first, that from the nature of the transaction (it being a creditors' deed), the object must have been to pass everything of value; and secondly, that the deed contained a provision that the assignees should pay the rent for a limited period.

1st Exception.—Where among general words something not *ejusdem generis* is mentioned by way of exception, this indicates that the general words are not to be restricted.

An assignment to creditors by a debtor of "all his stock-in-trade, book and other debts, goods, securities, chattels, and all effects whatsoever, except the wearing apparel of himself and family." *Held*, to pass a contingent interest, on the ground that the exception of the wearing apparel showed that it was intended that all the assignor's property with that exception was intended to pass; *Irison v. Gassiot*, 3 D. M. G. 958.

2nd Exception.—"If the particular words exhaust a whole genus, the general," [*i.e.*, 'collective,'] "words must refer to some larger genus;" *per* Willes, J., *Fenwick v. Schmalz*, L. R. 3 C. P. 315; citing *Reg. v. Payne*, L. R. 1 C. C. 27.

Rule 46 has been applied to the construction of Acts of Parliament; see Maxwell on the Interpretation of Statutes, 405, *et seq.* Rule applied to statutes.

Certain kinds of carriers and travellers were specifically mentioned in two Acts of Parliament on the same subject, and the words "other persons whatsoever" also appeared. *Held*, that the special description had the effect of excluding carriers not mentioned; *Sandiman v. Breach*, 7 B. & C. 96.

Act imposing rates on inhabitants of any "land, house, shop, warehouse, vault, mill, or other tenement" in a parish. *Held*, that the vicar was not rateable in respect of his tithes as an "other tenement;" *The Queen v. Nevill*, 8 Q. B. 452.

See also *East London Waterworks Co. v. Trustees for Mile End Old Town*, 17 Q. B. 512; *Lyndon v. Standbridge*, 2 H. & N. 45.

Freeholds only pass where the assurance is proper to pass them only.

Rule 47.—Where the terms of the description are general, and the instrument and mode of assurance are proper for conveying freeholds, there, *prima facie*, freeholds only will pass.

This is the rule laid down by Mr. Preston (Shep. Touch. 92), but the cases cited by him—namely *Rose v. Bartlett*, Cro. Car. 292; *Day v. Trigg*, 1 P. W. 286; *Knotsford v. Gardiner*, 2 Atk. 450—are all cases of wills. See *Edwards & Denton's Case*, Godb. 183; S. C. sub nom. *Turpine v. Forreynner*, 1 Buls. 99, a case of a deed, where, though the Judges expressed their opinion that the leasehold interest did not pass, the decision turned on another point.

It appears to be clear that, on the one hand, the conveyance will not be held to pass leaseholds or copyholds where the result would be to create a forfeiture; Shep. Touch. 91; *Francis v. Minton*, L. R. 2 C. P. 548; and that, on the other hand, it will pass leaseholds or copyholds where there are no freeholds which answer the description of the lands expressed to be conveyed; as in *Marshall v. Frank*, Gilb. Eq. Rep. 148; S. C. Pre. Ch. 480; or where they have for some considerable time been holden with and deemed part of the estate described in the deed; *Doe d. Davies v. Williams*, 1 H. B. 25.

Leaseholds passing as "personal property."

No general rule can be laid down as to whether leaseholds will pass by a general description of "personal property." The principal cases are *Ringer v. Cann*, 3 M. & W. 343; *Doe d. Farmer v. Howe*, 9 L. J. N. S. Q. B. 352; *Hopkinson v. Lusk*, 34 Beav. 215; *White v. Hunt*, L. R. 6 Ex. 32.

Rule 48.—By the conveyance of land abutting on a highway, or separated from it by a strip of uninclosed land, the *primâ facie* presumption of law, in the absence of evidence of ownership, is that the strip and the soil of the road *usque ad medium filum* passes : *Beckett v. Corporation of Leeds*, L. R. 7 Ch. Ap. 421 (b). Land abutting on highway.

“*Primâ facie* the presumption is that a strip of land, lying between a highway and the adjoining close, belongs to the owner of the close ; as the presumption also is that the highway itself, as [*sic ; qy. ad*] *medium filum rive*, does. But the presumption is to be confined to that extent ; for if the narrow strip be contiguous to, or communicate with, open commons, or larger portions of land, the presumption is either done away or considerably narrowed ;” *per Gibbs C.J., Grose v. West*, 7 Taunt. 41. See also *Simpson v. Dendy*, 8 C. B. N. S. 433, affirmed on app. 7 Jur. N. S. 1058 ; and as to a footpath, *Berry & Goodman’s Case*, 2 Leon. 147. Footpath.

“It appears to me that a conveyance of land, described as abutting on a road, passes a moiety of the soil of the road, unless there be something in the context to exclude it. It is like the case put in Rolle’s Abridgment *Graunts* (P.), pl. 6, ‘Si home grant un messuage vocatum Falstolfe Place, prout undique includitur aquis, per ceux paroles le soile del motes en que le ewe est passera ; P. 9 Car. B. R., enter *Stint & Morgan*, per Curiam, resolve sur un trial al barr.’ And this received the assent of Chief Baron Comyns ; see Com. Dig. *Grant* (E. 6) ;” *per Willes, J., Simpson v. Dendy*, 8 C. B. N. S. 472.

“I am of opinion that, where a close is conveyed with a description by measurement and colour on a plan annexed to and forming part of the conveyance, and the close abuts on a highway, and there is nothing to exclude

(b) See Glen on Highways, chap. 3, p. 39, *et seq.*, and authorities there cited.

it, the presumption of law is that the soil of the highway *usque ad medium filum* passes by the conveyance;” *per Erle, C.J. Berridge v. Ward*, 10 C. B. N. S. 415.

“I quite agree that where there is a plot of land conveyed adjoining to a road or river, the *prima facie* presumption is, that up to the medium filum aquæ or viæ, whichever it may be, belongs to the purchaser . . . But . . . it has always been held to be enough [*i.e.*, to rebut that presumption] when there is anything to show that it was not the intention to convey any part of the road;” *per Blackburn, J., Plumstead Board of Works v. British Land Co.*, L. R. 10 Q. B. 24.

The rule applies whatever be the tenure of the property.

Copyholds or
leaseholds.

“As to the property granted, a copyholder stands in the place of the lord, the leaseholder in the place of the lessor. It is very improbable that when a lease or grant is made of land near the high road, and there is between the highway and the land inclosed a small quantity of uninclosed land, of little or no use to the lord or lessor, that he should separate it from the rest, or reserve to himself such land. When a grant of land near to a road is made (even where it is inclosed and separated from the land adjoining), it appears to me that the *prima facie* presumption is, that the land, on that side of the fence on which the road is, passes likewise with it. Generally speaking, where an inclosure is made, the party making it erects his bank and digs his ditch on his own ground, on the outside of the bank. The land which constitutes the ditch in point of law is a part of the close, though it be on the outside of the bank. And if something further is done for his own convenience when that which constitutes the fence is dug out from his land, as, for instance, if a small portion of uninclosed land near a public or private way is left out of the inclosure to protect and secure the occupation of that part of the land which is inclosed, that, in point of law, is a part of the close on

which the inclosure is made. If any grant of such land, being copyhold, had been made before the inclosure, the subsequent grants would probably continue to be made in the same way, notwithstanding the inclosure, and all the land, both within and without the inclosure, would, therefore, pass by those grants. It seems to me, therefore, that the rule that waste land near a highway is to be presumed *prima facie* to belong to the owner of the inclosed land next adjoining, is not confined to a case where the owner of that land is a freeholder, but extends equally to cases where the owner is a leaseholder or a copyholder. In either case evidence may be given to rebut the *prima facie* presumption;” *per* Holroyd, J., *Doe d. Pring v. Pearsey*, 7 B. & C. 304; S. C. 9 D. & R. 908.

On the other hand, in *The Marquis of Salisbury v. The Great Northern Railway Co.*, 5 C. B. N. S. 174, where the lord of the manor had made a grant of a strip of waste by the roadside as copyhold, Williams, J., says (at p. 209); “We must look to the intention,—Did he or did he not intend to pass to the grantee any rights which he had in the soil of the road? When we find that the piece of land so granted was to be held of the lord as part of the copyhold of the manor, it seems to me to be impossible to say that it was intended to convey anything but the right to the very piece of land granted, the right to the soil of the adjoining road being left as it was.” In that case the books and plans deposited by a railway company according to the Act of Parliament, included three pieces of land, numbered 75, 79, and 47, and gave their exact contents. The piece No. 47 was in fact the turnpike road, and was described as belonging to the trustees of the road. It was held that though the road really belonged to the owner of 75 and 79, the conveyance by him of the freehold of those plots, which adjoined the road, did not pass any part of the soil in it. The recitals referred to the plans, in which the road was treated as a distinct parcel of land, and the grant was made by reference to a schedule which did not include No. 47. The

decision proceeded on the "particular circumstances of the case" (p. 209), and form of the conveyance (see *per* Blackburn, J., in L.R., 10 Q.B., p. 22). And Williams, J., said that "in the ordinary case, the soil of the road passes, although the conveyance is silent as to its existence and although the particular measurement of each piece is given and would exclude the road."

Strip communicating
with commons,
&c.

But the rule does not apply if the narrow strip between the land described in the conveyance and the road be contiguous to or communicate with open commons or larger pieces of land. In that case the evidence of ownership which applies to the larger portions applies also to the narrow strip which communicates with them; *Grose v. West*, 7 Taunt. 39.

Bed of river.

Apparently the grant of land bounded by a non-tidal (c) river passes the bed of the river to the middle.

The law is summed up by Fitzgerald, J., as follows:—
"The authorities adverted to in the course of the argument establish, as a general rule of construction, that where land adjoining a highway or inland river is granted, the *prima facie* presumption is that the parties intended to include in the grant a moiety of the road or of the river bed, as the case may be; and that such general presumption ought to prevail, unless there is something to indicate a contrary intention; . . . and the authorities seem further to establish that this general presumption is not to be considered as rebutted by this circumstance alone,

(c) There is no presumption that the ownership of the bed of a tidal river goes with the ownership of the adjoining soil, and therefore in Crown grants of land on tidal rivers, *prima facie* the boundary would be high-water mark, though evidence might show that the soil between high and low-water mark, or the bed below low mark, passed by the description of the land. See Coulson & Forbes on the Law of Waters, p. 71.

that the subject of the grant is described as abutting on or bounded by the road or river, or that the quantity of land specifically described as granted is satisfied without including the half of the road or river, or that the grant refers to a map or plan in which the half of the road or river is not included. To rebut the general presumption, there must be something in the language of the grant indicating an intention to exclude [or] something in the subject-matter or in the surrounding circumstances from which such an intention may reasonably be inferred ;” *Dwyer v. Rich*, Ir. Rep. 6 C. L. 149. See also *per* Blackburn, J., *Plumstead Board of Works v. British Land Co.*, L. R. 10 Q. B. at p. 24 ; *Lord v. Commissioners of the City of Sydney*, 12 Moo. P. C. 473, where many authorities are cited ; *per* Lord Cranworth, C., *Wishart v. Wyllie*, 1 Macq. 389 ; and *Orr-Ewing v. Colquhoun*, 2 App. C. at p. 854.

Although, in the absence of direct evidence of owner-ship, the presumption is that the soil of a private road *usque ad medium filum* belongs to the adjoining owners (*Holmes v. Bellingham*, 7 C. B. N. S. 329 ; S. C. 29 L. J. C. P. 132 ; *Smith v. Howden*, 14 C. B. N. S. 398), and therefore probably a conveyance of the adjoining land passes the soil of the road *usque ad medium filum*, yet there is very great difficulty in holding that the soil of the road would pass by the conveyance of a plot of ground forming part of an estate laid out for building ; *Plumstead Board of Works v. British Land Co.*, L. R. 10 Q. B. 16. It will be observed that, from the nature of the case, the owner of the building estate intends to grant some rights over the roads to subsequent purchasers, and he will be unable to do this unless he retains the soil of the roads in himself. This argument is the more cogent when the property sold is described as bounded by an intended new street, for in this case, unless the width of the street is stated, the position of the middle of the street, and therefore the boundary of the property sold, will depend upon the width that is actually given to the street, which is not known at the time of the conveyance ;

Building
estate.

Streets in towns.

Leigh v. Jack, 5 Ex. D. 264. Probably the rule does not apply to the case of a street in a town; *Beckett v. Corporation of Leeds*, L. R. 7 Ch. 421.

Party wall.

Probably the conveyance of one of two houses separated by a wall, where the person conveying owns both of them, passes an undivided moiety of the wall; see *Wiltshire v. Silford*, 1 Man. & Ry. 404, 407; *Cubitt v. Porter*, 8 B. & C. 257; S. C. 2 Man. & Ry. 267.

See as to meaning of "party-wall," *Watson v. Gray*, 14 Ch. D. 194; *Standard Bank of Br. S. Am. v. Stokes*, 9 Ch. D. 68; *Knight v. Pursell*, 11 Ch. D. 412; 18 & 19 Vict. c. 122, part 3.

Easements by what words created.

Rule 49.—No special words are necessary for the creation of an easement, or a *profit à prendre*.

Examples.—An easement has been created by the words "A. grants and agrees with B., his heirs and assigns, that it should be lawful for them at all times to have," &c.; *Holms v. Seller*, 3 Lev. 305; a *profit à prendre* by "Provided always, and it is hereby covenanted, granted, and concluded," &c.; *Lord Mountjoy's Case*, 1 Anders. 307; S. C. Godb. 17; S. C. J. Moo. 174; sub nom. *Huntington v. Mountjoy*.

On the construction of grants of right of way, see *Cannon v. Villars*, 8 Ch. D. 415, where it is pointed out that the construction must depend on the nature of the road over which it is granted, and the purpose for which it is intended to be used. See *post*, 198.

On the question whether the grant of a right of way authorises the laying down of a railway, see *Senhouse v. Christian*, 1 T. R. 560; *Dand v. Kingscote*, 6 M. & W. 174; *Neath Canal Co. v. Ynisarced Resolven Colliery Co.*, L. R. 10 Ch. 450.

The grantee of a right of way cannot use it for access

to a close other than that for which it was granted; *Henning v. Burnett*, 8 Ex. 187.

As to the question whether the right of way granted is appurtenant or in gross, see *Ackroyd v. Smith*, 10 C. B. 164; *Thorpe v. Brumfitt*, L. R. 8 Ch. 650.

See as to rights of way passing under general words, and as to the extent of rights of way, *post*, Chapter XIII. GENERAL WORDS, pp. 191, *et seq.*

CHAPTER XIII.

GENERAL WORDS (a)—ALL ESTATE CLAUSE (b).

Things legally appendant and appurtenant—"Appurtenances"—General words, how restricted—Grant of part of tenement—"Continuous and apparent" easements—"Necessary" easements—Way of necessity granted by implication—Express grant of way—Rights retained by owner granting part of tenement—Reciprocal easements—Implied reservation of way of necessity—Contemporaneous sales—When way across tenement passes by grant of adjoining tenement—Revival of right of common extinguished by unity of possession—Conveyance of "estate," "right," or "interest"—Where a trustee has beneficial interest.

Things appendant or appurtenant pass by conveyance of principal.

Rule 50.—That which is legally appendant or appurtenant passes by the conveyance of the principal, without the words "with the appurtenances," or the like; Shep. Touch. 89; Co. Lit. 121; *Whistler's Case*, 10 Rep. 63a.

This rule is included in the maxim "*Accessorium non ducit sed sequitur suum principale*;" Co. Lit. 152a.

(a) The reader is warned against a source of confusion. The phrase "general words" sometimes means the words inserted immediately after the parcels for the purpose of passing easements and other rights, usually enjoyed with, but not legally appendant or appurtenant to, them, in conveyances before 1882, but now omitted in reliance on the C. A. 1881, s. 6; at other times it means the description of a class of things by their general name, as "personal estate."

(b) See as to conveyances after 1881, the C. A. 1881, s. 63.

“The incident, accessory, appendant, and regardant, shall in most cases pass by the grant of the principal, without the words *cum pertinentiis*, but not *à converso*; for the principal doth not pass by the grant of the incident, &c. *Accessorium non ducit, sed sequitur, suum principale*. And therefore by the grant of a reversion without naming the rent, a reversion after an estate tail, for life, or for years, and the rent reserved upon the estate, will pass, so as the tenant attorn to the grant [attornment is no longer necessary]; but by the grant of the rent the reversion will not pass. So by the grant of a manor, the Court Baron thereunto belonging will pass, by the grant of a house, or ground, the ways [and other conveniences, as garden, &c.] thereunto belonging do pass; by the grant of arable land, the common appendant thereunto will pass; by the grant of mills, the waters, flood-gates, and the like that are of necessary use to the mills do pass [also a stone belonging to the mill, though separated from the mill to be new worked]; by the grant of a house, the estovers appendant thereunto will pass; by the grant of a manor, the advowsons appendant, and villains regardant thereunto, pass [but they may be severed by exception]; by the grant of a fair, the Court of Pie-powders will pass; by the grant of homage, or rent, the fealty will pass; and by the grant of escuage, homage and fealty will pass;” Shep. Touch. 89.

“Appendant is any inheritance belonging to another that is superior or more worthy. In law it is called *pertinens, quasi invicem tenens*, holding one another; a word indifferent both to things appendant and things appurtenant. The quality and nature of the things do make the difference. Appendants are ever by prescription; but appurtenants may be created in some cases at this day. As if a man at this day grant to a man and his heirs common in such a moor for his beasts levant or couchant upon his manor; or if he grant to another common of estovers or turbary in fee simple, to be burnt or spent within his manor; by these grants these commons are appurtenant to the manor, and shall pass

Appendant
and appurte-
nant.

by the grant thereof;" Co. Lit. 121b. See *Atkyns v. Clare*, 1 Vent. at p. 407.

As to what can be "appendant" to another thing, see Co. Lit. 121b, 122a; *Tyrringham's Case*, 4 Rep. 36b; Viner Abr. s. v. "Appendant."

"Appurtenances."

As to the meaning of "appurtenances," see *Plant v. James*, 2 N. & M. 517; S. C. 5 B. & Ad. 791; S. C. in error, 6 N. & M. 282; 4 A. & E. 749; *Worthington v. Gimson*, 2 El. & El. 618; *Barlow v. Rhodes*, 1 Cr. & M. 489; *Evans v. Angell*, 26 Beav. 205.

"Appurtenant" secondary meaning (c).

Rule 51.—Although the word "appurtenant" is properly used in its strict legal sense, it may be used in some secondary meaning as "usually enjoyed with;" *Hill v. Grange*, Plow. 170a.

In *Hill v. Grange*, Dy. 130a, S. C. 1 Plow. 164; *Gennings v. Lake*, Cro. Car. 168, a piece of land usually enjoyed with a messuage passed by a lease of the messuage "with all the lands to the same messuage appertaining."

A conduit (d), *Brown v. Nichols*, F. Moo. 682; *Nicholas v. Chamberlain*, Cro. Jac. 121; a garden, *Doe d. Norton v. Webster*, 12 A. & E. 442, passed by a conveyance of a house "with the appurtenances." See also *Archer v. Bennett*, 1 Lev. 181; S. C. 1 Sid. 211; 1 Keb. 736; *Morris v. Edgington*, 3 Taunt. 24; *Anon*, Owen, 31; and 2 Wms. Saund. 400, note (2) (ed. 1871, vol. 2, p. 806).

But a conveyance of a house "with the appurtenances" will not pass an adjoining building not accounted parcel of the house, though held with it for thirty years; *Bryan v. Wetherhead*, Cro. Car. 17; and see *Maitland v.*

Grant by deed and parol licence distinguished.

(c) See *per* Blackburn, J., in *Kay v. Oxley*, L. R. 10 Q. B. at p. 368, as to the difference between a grant by deed, and a mere parol licence to use a way. "In the one case it would have been appurtenant, in the other case it would have been enjoyed as if it were appurtenant."

(d) But would it not have passed without the words "with the appurtenances"? See the next rule.

Mackinnon, 1 H. & C. 607; *Kerslake v. White*, 2 Stark. 508.

“*With the appurtenances*” is construed more strictly in a deed than in a will; *Ongley v. Chambers*, 1 Bing. 483.

“General words in a grant must be restricted to that which the grantor had then” [*i.e.*, at the time of granting] “the power to grant, and will not extend to anything that he may subsequently acquire;” *per* Mellish, L.J., *Booth v. Alcock*, L. R. 8 Ch. 667; S. C. 42 L. J. Ch. 557.

Rule 52.—By the grant of part of a tenement, all those continuous and apparent easements over the part retained by the grantor, which are necessary to the enjoyment of the part granted, and have before and up to the time of the grant been used therewith, pass to the grantee; *Wheeldon v. Burrows*, 12 Ch. D. 31.

Observation.—The word “easement” is not used in its strict sense in this rule, for when the two parts of the tenement are in the same ownership, all the acts which the owner does may be referred to his ownership (see *per* Fry, J., *Bolton v. Bolton*, 11 Ch. D. 970). In this rule the word is used to mean a right which would have been an easement if the several parts of the tenement had belonged to different owners.

Explanation.—By apparent easements are meant “not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject;” Gale on Easements, 5th ed. p. 100, cited with approval in *Pyer v. Carter*, 1 H. & N. 922.

Explanation.—By “necessary” is meant necessary for the enjoyment of the tenement in its existing state; *Pyer v. Carter*, 1 H. & N. 921. It has been defined by Lord

Campbell (*Ewart v. Cochrane*, 7 Jur. N. S. 925; S. C. 4 Macq. Sc. Ap. 117) as "necessary for the convenient and comfortable enjoyment of the property as it existed before the time of the grant" (*i.e.*, before the severance). For examples of easements of necessity, see Gale on Easements, 5th edit. ch. 2, s. 2, p. 181; *Dand v. Kingscote*, 6 M. & W. at p. 196; *Liford's Case*, 11 Rep. at p. 52; *D'Arcy v. Askwith*, Hob. 234; *Hodgson v. Field*, 7 East, 613; *Cardigan (Earl-of) v. Armitage*, 2 B. & C. at p. 207; *Elliott v. N. E. Ry. Co.* 10 H. L. C. at p. 356 (*q. v.* as to conveyances of land for special purposes, as to which see also S. C., 1 J. & H. at p. 158, *per* Wood, V.-C.).

"There is a distinction between easements used from time to time, such as a right of way, and easements of necessity, or continuous easements. The cases recognise this distinction, and it is clear law that, upon a severance of tenements, easements used of necessity, or (*e*) in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shows an intention that they should pass;" *per* Erle, C.J., *Polden v. Bastard*, L. R. 1 Q. B. 161; S. C. 7 B. & S. 130; 35 L. J. Q. B. 92; approved by Mellish, L. J., in *Watts v. Kelson*, L. R. 6 Ch. at p. 173.

Examples.—Where the drainage of a tan-yard ran into a cesspool in an adjoining garden, and the owner of both properties sold the tan-yard, *held* that the easement passed by the conveyance; *Ewart v. Cochrane*, 7 Jur. N. S. 925; S. C. 4 Macq. Sc. Ap. 117.

Where A. built a house and let it to B., and afterwards let the adjoining land to C., it was held that C. could not block up the windows of the house, for no person who claims the land under the builder can obstruct the lights, any more than the builder himself could, who cannot derogate from his own grant; *Palmer v. Fletcher*, 1 Lev.

(*e*) *Sic*; but should it not run "*which are in their nature, &c.*"?

122; S. C. sub nom. *Palmer v. Fleshees*, 1 Sid. 167, 227; Raym. 87; 1 Keb. 553, 625, 794. In the report in 1 Sid. 167 it is said that if A. lets two adjoining plots for building to B. and C., and B. builds a house, and afterwards C. in digging his cellar makes B.'s house fall, B. has no action against C. The distinction between the two cases is that in the first case the *quasi* easement had been used before the severance, and therefore passed by the grant; in the latter case the *quasi* easement had not been so used and therefore did not pass. See also, to the same effect, *Cox v. Matthews*, 1 Vent. 237, 239, 248; *Compton v. Richards*, 1 Price, 27.

"If a man have a vacant piece of ground, and build thereupon, and that house has very good lights, and he lets this house to another, and after he builds upon a contiguous piece of ground, or lets the ground contiguous to another, who builds thereupon to the nuisance of the lights of the first house, the lessee of the first house shall have an action upon this case against such builder, &c., for the first house was granted to him with all the easements and delights then belonging to it;" *per* Holt, C.J., *Rosewell v. Pryor*, 6 Mod. 116.

The owner of a field in which there was a watering place for cattle supplied by a stream flowing through a place called the Hopyard, purchased the Hopyard, and then sold the field in which the watering place was. *Held*, that he could not obstruct the flow of water; *Sury v. Pigot*, Pop. 166; S. C., Noy. 84; Tud. L. C. R. P. (3rd ed.) 154. See, to the same effect, *Canham v. Fisk*, 2 Cr. & Jer. 126; S. C., 2 Tyr. 155.

A right of way is not a "continuous and apparent" easement within Rule 52: nevertheless Right of way.

Rule 53.—"Where a man having a close surrounded with his own land, grants the close to another in fee, for life, or years, the grantee shall have a way to the close over the grantor's land as incident to the grant" [*i.e.*, without any express words], "for without it he cannot derive any Implied grant of way of necessity.

benefit from the grant. So it is where he grants the land and reserves the close to himself;" 1 Wms. Saund. 323, n. See *Pinnington v. Galland*, 9 Exch. 1; Tud. L. C. Real P. (3rd ed.), 177.

Ways of convenience.

There was an inclination in *Morris v. Edgington*, 8 Taunt. 24, to extend the principle to ways "necessary for the most convenient enjoyment," though they may not be ways of necessity properly so called. But this extension seems to be opposed to the current of authority; see Gale, on Easements, Ch. II., s. 2, pp. 137, 138; *Pheysey v. Vicary*, 16 M. & W. 484; *Dodd v. Burchell*, 1 H. & C. 113; *Pearson v. Spencer*, 3 B. & S. 761.

Cesser of way of necessity.

As to cesser of the right of way when the necessity ceases, see *Holmes v. Goring*, 2 Bing. 76; S. C., 9 Moo. 166; *Corporation of London v. Riggs*, 13 Ch. D. 798; but see *Proctor v. Hodgson*, 10 Exch. 824.

Extent of way of necessity when implied in favour of grantor.

Where the owner of a close surrounded by his own land grants the land and reserves the close, he has a way of necessity to the close, not for all purposes, but only so as to enable the owner of the close to enjoy it in the condition it was in at the time of the grant; *Corporation of London v. Riggs*, 13 Ch. D. 798.

As to a way of necessity where the grantor was a trustee of the part granted; see *Howton v. Frearson*, 8 T. R. 50.

New road over adjoining tenement (f).

Rule 54.—If the owner of two adjoining tenements, A. and B., makes and uses for his own convenience a way across B. to A., and then conveys A. to a purchaser, "with all ways, &c., thereto appertaining, and with the same now or heretofore occupied and enjoyed," the purchaser of A. will not become entitled to the way across B.

"During unity of possession there is no right of way properly so called, because of course the owner can go

over his own land whenever he pleases . . . It is obvious, therefore, that, if these words were held to create a new right of way, they would give to the purchaser the right of going over the adjoining property of the vendors in every direction in which they had been accustomed to go to or from the land in question, and that in a case where such access is not necessary for the convenient use and occupation of the piece of land so sold. This evidently could not be the intention of the vendors. The question depends upon the construction of the deed ; and it is clear that these words have only a natural meaning according to the circumstances of the case, and not a technical meaning extending to every road which the owner may have made for his own temporary convenience. I do not think that the words have such a meaning by themselves. I do not think that the vendors used them in that sense. I think no case exists which compels me to give them a meaning contrary to that which in the circumstances of the case they will properly bear ;" *per Romilly, M.R., Thomson v. Waterlow*, L. R. 6. Eq. 42 ; see to the same effect, *Bolton v. Bolton*, 11 Ch. D. 970 ; *Langley v. Hammond*, L. R. 3 Ex. 161. The rule was applied to a deed of partition in *Worthington v. Gimson*, 2 El. & El. 618.

The rule was properly held not to apply where the owner of the two tenements let one of them, and during the term gave verbal permission to the tenant to use a private road for certain purposes, and before the permission was revoked conveyed the property comprised in the lease to the tenant "with, &c.," as in the rule. It was held that the way might be used by the purchaser for those purposes only for which he had been allowed to use it prior to the sale ; *Kay v. Oxley*, L. R. 10 Q. B. 360.

Exception.—*Probably*, if a man makes a road Road to house. for the sole use of his house over an adjoining field, and sells the house without the field, the road passes.

In *Langley v. Hammond*, L. R. 3 Ex. 161, Bramwell, B., says, "I am not prepared to say, and I do not understand the Master of the Rolls to have decided, that a right of way could not pass under words such as those here used, even though there had always previously been unity of ownership and possession, and should the case arise, I should like for time to consider before I assented to the doctrine supposed to have been laid down. Suppose a house to stand 100 yards from a highway, and to be approached by a road running along the side of a field used for no other purpose, but only fenced off from the field, which I assume to be the property of the owner of the house. I should wish for time to consider before deciding that on the conveyance of the house the right to use that road, not being a way of necessity, would not pass under such words as these." See also the remarks of Mellish, L.J., in *Watts v. Kelson*, L. R. 6 Ch. 172, and of Fry, J., in *Barkshire v. Grubb*, 18 Ch. D. 616. See observation on next page.

Ancient road
over adjoining
tenement (g).

Rule 55.—Apart from the effect of the Conveyancing Act, 1881, and subject to the provisions of the Act where it applies, if the owner of two adjoining tenements, A. and B., uses a way across B. to A. which existed before A. and B. belonged to the same person, and then conveys A. to a purchaser, "with all ways, &c., thereto appertaining, and with the same *now or heretofore used and enjoyed*," the right of way will pass by the conveyance; but it did not pass by a conveyance, before 1882 (h), of A. "with all ways, &c., thereto appertaining."

(g) See observation *post*, p. 195.

(h) See the C. A. 1881, s. 6, which enacts that "a conveyance of land shall be deemed to include, and shall by virtue of this Act operate to convey with the land, all . . . ways . . . rights . . . whatsoever appertaining or reputed to appertain to the land or any part thereof, or at the time of the conveyance demised, occupied, or enjoyed with, or reputed

The Rule may perhaps be extended to the case of every discontinuous easement, not being an easement of necessity.

“It has been decided over and over again that where an easement has become extinct by unity of ownership, and the owner wishes to grant the easement with the premises to which it was formerly appurtenant, he must use language to show that he intended to create the easement *de novo*. If you convey the close, with all ways thereto belonging and appertaining, the easement will not pass, except in a case of a way of necessity, where such a way would pass without any words of grant of ways. If in the case of an easement extinguished by unity of ownership, a man grants the land to which before the extinguishment the right was attached, and uses only the words ‘appertaining and belonging,’ the right will not pass, these words not being sufficient to revive the right. There are, however, apt words for the purpose of passing such an easement; and if you will only insert the words ‘or therewith used and enjoyed,’ the right would pass. It has been said at the Bar that there is a distinction between ‘belonging’ and ‘appertaining;’ it is the first time that I have heard of such a distinction;” *per* Bayley, B., *Barlow v. Rhodes*, 1 Cr. & M. 448. See to the same effect, *James v. Plant*, 5 B. & Ad. 791; 2 Nev. and M. 517; S. C. in error, 6 Nev. & M. 282; 4 A. & E. 749; *Worthington v. Gimson*, 2 El. & El. 618; 29 L. J. Q. B. 116; and the remarks of Kelly, C.B., in *Langley v. Hammond*, L. R. 3 Ex. 161.

Observation on Rules 54 and 55.—Rules 54 and 55 state the law as it is usually laid down; but, bearing in mind that they are merely rules of construction, the object of which is to enable us to ascertain the meanings of the words employed, it appears improbable that the answer to the question whether a right of way over close

Observation
on Rules 54
and 55.

or known as part or parcel of or appurtenant to the land or any part thereof.”

B. passes by a conveyance of close A. can depend solely upon the fact that, at a time possibly remote, before unity of possession, the way was used, a fact which may not be in the knowledge of the parties to the conveyance. The construction to be put upon the deed must depend upon the circumstances of the case, the most important of which are *first*, whether the way was in fact used before unity of possession; *second*, whether the way over close B. is a defined road, so as to distinguish the case from those in which the owner has been in the habit of passing over close B. in any manner and direction in which he thought proper; and *third*, whether it was used during unity of possession for some purpose of convenience which does not cease on severance. See all these points discussed in *Kay v. Oxley*, L. R. 10 Q. B. 360.

* The words "with all ways, &c.," must mean something.

The words "with all ways, &c.," in a deed before 1882, must bear some meaning; and the further question arises—What is meant by them? They may mean (1) ways over the land of strangers; (2) a way over close B., *i.e.*, a close retained by the vendor, which was originally enjoyed as an easement before unity of possession; and (3) a right of way over close B. intended to be created as an easement *de novo*; and it must depend upon the circumstances whether all, or, if not all, which of these ways are intended to pass.

It may be observed that a way from close A. over close B. used before unity of possession would probably be a defined way, as no man would be likely to allow his neighbour to pass over his land in any direction that he liked, and would probably be for the convenience of close A. after severance, as it must have been for its convenience before unity of possession, and therefore proof of user before unity of possession is strong evidence that the way is sufficiently defined, and that it will be convenient after severance. These considerations lead to the following rule.

a conveyance by the owner of two adjoining tenements, A. and B., of tenement A. (either with or without the words "with all ways, &c."), passes a right of way over B. depends upon the circumstances; but the right will generally pass whether it was or was not used before unity of possession; provided, *first*, that the way is over a specific portion of the soil of tenement B. appropriated by the owner as a road to tenement A.; and *secondly*, that the convenience of use does not cease upon the severance.

as to ways
over tenement
retained by
the grantor.

In deeds before 1882 the employment of the words "with all ways, &c.," is an argument that the way was intended to pass.

See, as to the way being over a specific road, *per* Lush, J., *Kay v. Oxley*, L. R. 10 Q. B. at p. 370, distinguishing *Thomson v. Waterlow*, *post*, on this ground; *per* Mellish, L.J., *Watts v. Kelson*, L. R. 6 Ch. at pp. 172, 174, approving the remarks of Bramwell, B., in *Langley v. Hammond*, L. R. 3 Ex. 161, 170; and *per* Fry, J., in *Barkshire v. Grubb*, 18 Ch. D. at p. 622, citing and adopting the judgment in *Watts v. Kelson*, *ubi sup.* In *Thomson v. Waterlow*, L. R. 6 Eq. 36; S. C., 37 L. J. Ch. 495; 16 W. R. 686; 18 L. T. 545; it does not appear clearly from the report in the Law Reports, whether the road was or was not a "formed" road. But the reports in the Law Journal and Weekly Reporter show that it was not; see 37 L. J. Ch., at p. 498, where, *per* Romilly, M.R.:—"There was no road laid out or formed on the land itself. The road, if it can be so called, was a mere track of wheels across a rough piece of grazing land." See, as to the convenience of use not ceasing upon the severance, *per* Romilly, M.R., *Thomson v. Waterlow*, L. R. 6 Eq. 41; and *per* Blackburn, J., *Kay v. Oxley*, L. R. 10 Q. B. at pp. 366, 367, distinguishing *Langley v. Hammond* on this ground.

Effect of express grant of right of way (i).

Rule 56.—Where there is an express grant of the unrestricted user of a private right of way to a particular place, the grant is not restricted to access to the land for the purposes for which access would be required at the time of the grant.

The Great Eastern Railway purchased from the Crown land for the purpose of their line, intersecting land acquired by the Crown under an Act of Parliament which prohibited building upon it, as it was within the range of the guns of a fort. At the time of the purchase the land was used only for pasture. The Great Eastern Railway agreed to make four level crossings over their line, by which access could be had from one part of the severed land to the other. Some years after the agreement the part of the land beyond the crossings was sold to the United Land Company, and the statutory prohibition against building being removed, the land was laid out in lots for building purposes. *Held*, that the level crossings might be used for purposes of access to the houses so built; *United Land Co. v. Great Eastern Railway Co.*, L. R. 17 Eq. 158; S. C. L. R. 10 Ch. 586.

An inclosure award made in 1760 set out certain roads for the owners for the time being of certain allotments, and their tenants and farmers to and from certain allotments. It was provided that one of the roads should be thirty feet wide, and that if any owner of an allotment should "street out" the way it should always remain eleven yards wide between the quick-sets. More than a century after the award was made one of the allotments was used as building land, and the owner began to convert the cart road into a metalled road. *Held*, that he might use the right of way for other than agricultural purposes; *Newcomen v. Coulson*, 5 Ch. D. 133.

By an inclosure award a road was set out as a carriage-

(i) As to the construction of an express grant of a right of way by the nature of the *locus in quo* over which the way is granted, see *Cannon v. Villars*, 8 Ch. D. at p. 420; see also, *ante*, p. 184.

road and drift-way from a highway to certain of the inclosed lands. A railway company acquired some of these lands and built a cattle-pen thereon adjoining their railway, and used the road for the passage to and from the highway of cattle that were to be or had been conveyed on their railway, such user being much greater than the user at the time of the grant, which was exclusively for agricultural purposes. *Held*, that this was a lawful user on their part, and that they were not restricted to the user which existed at the time of the grant; *Finch v. Great Western Railway Co.*, 5 Ex. D. 254.

Rule 57.—In the absence of express stipulation, the grantor of part of a tenement retains no rights of any nature over the part granted; *Suffield v. Brown*, 4 De G. J. & S. 194; *Wheeldon v. Burrows*, 12 Ch. D. 31; *Russell v. Watts*, 25 Ch. D. 559.

No implied reservation in favour of grantor of part of tenement.

In *Pyer v. Carter*, 1 H. & N. 916, it was held that, on the sale of part of a tenement, there was implied in favour of the vendor a reservation of an apparent and continuous easement annexed in enjoyment to the part reserved over the part sold; in fact, that there is no distinction between an implied easement and an implied grant. Although this decision was approved of by Mellish and James, L.JJ., in *Watts v. Kelson*, L. R. 6 Ch. 166, its principle was over-ruled in *White v. Bass*, 7 H. & N. 722, and the decision itself was strongly disapproved of by Lord Westbury, C., in *Suffield v. Brown*, 4 De G. J. & S. 185, by Lord Chelmsford, C., in *Crossley Sons v. Lightowler*, L. R. 2 Ch. 478, and by the Court of Appeal in *Wheeldon v. Burrows*, 12 Ch. D. 31, on the ground that no man should be allowed to derogate from his own grant, and it must, it is submitted, be considered as having been over-ruled, unless it can be upheld on the grounds stated by Thesiger, L.J., in *Wheeldon v. Burrows*, 12 Ch. D. 59; see the next page.

Reciprocal
easements
implied.

First Exception.—Reciprocal easements may be implied in favour of both parties ; see *per* Cotton, L.J., *Russell v. Watts*, 25 Ch. D. at p. 572.

“ We are all of opinion that, where houses have been erected in common by the same owner upon a plot of ground, and therefore necessarily requiring mutual support, there is, either by a presumed grant or by a presumed reservation, a right to such mutual support ; so that the owner who sells one of the houses, as against himself grants such right, and on his own part also reserves the right, and consequently the same mutual dependence of one house upon its neighbours still remains ; ” *Richards v. Rose*, 9 Ex. 218.

“ I have already pointed to the special circumstances in *Pyer v. Carter* (1 H. & N. 916), and I cannot see that there is anything unreasonable in supposing that in such a case, where the defendant under his grant is to take this easement, which had been enjoyed during the unity of ownership, of pouring his water upon the grantor's land, he should also be held to take it subject to the reciprocal and mutual easement by which that very same water was carried into the drain on that land, and then back through the land of the person from whose land the water came. It seems to me to be consistent with reason and common sense that these reciprocal easements should be implied ; and although it is not necessary to decide the point, it seems to me worthy of consideration in any after case, if the question whether *Pyer v. Carter* is right or wrong comes for discussion, to consider that point ; ” *per* Thesiger, L.J., *Wheeldon v. Burrows*, 12 Ch. D. 59.

Implied reservation of way of necessity to grantor.

Second Exception.—There is an implied reservation in favour of the grantor of ways of necessity over the part granted ; see *per* Cotton, L.J., *Russell v. Watts*, 25 Ch. D. at p. 573.

Where a man having a close surrounded by his own land, grants the close to another in fee, for life, or years, the grantee shall have a right of way to the close over the grantor's land as incident to the grant; for without it he cannot derive any benefit from the grant. So it is where he grants the lands and reserves the close to himself; *Pomfret v. Ricraft*, 1 Wms. Saund. 323 (ed. 1871, p. 568), note 6, citing *Clarke v. Cogge*, Cro. Jac. 170; *Jorden v. Atwood*, Owen, 121; *Staple v. Heydon*, 6 Mod. 1; *Howton v. Pearson*, 8 T. R. 50. This note is cited with approval by Martin, B., in the judgment of the Court in *Pinnington v. Garland*, 9 Ex. 1, where he adds:—"It no doubt seems extraordinary that a man should have a right which certainly derogates from his own grant; but the law is distinctly laid down to be so, and probably for the reason given in *Dutton v. Taylor* (2 Lutw. 1487), that it was for the public good, as otherwise the close surrounded would not be capable of cultivation." See also *Wheldon v. Burrows*, 12 Ch. D. 31.

In *The Corporation of London v. Riggs*, 13 Ch. D. 798, Extent of way of necessity. the question arose what was the extent of a way of necessity. It was held by Jessel, M.R., citing *Gayford v. Moffatt*, L. R. 4 Ch. 133, that the right of way must be limited to that which is necessary at the time of the grant; that is, the owner must be supposed to take a regrant to himself of such a right of way as would enable him to use the reserved thing as it was at the time of the grant. His Lordship says (at p. 807), "That appears to me to be the meaning of a right of way of necessity. If you imply more, you reserve to him not only that which enables him to enjoy the thing he has reserved as it is, but that which enables him to enjoy it in the same way and to the same extent as if he had reserved a general right of way for all purposes: that is—as in the case I have before me—a man who reserves two acres of arable land in the middle of a large piece of land is to be entitled to cover the reserved land with houses, and call on his grantee to allow him to make a wide metalled road up to it. I do not think that is a fair meaning of a way

of necessity ; I think it must be limited by the necessity at the time of the grant ; and that the man who does not take the pains to secure an actual grant of a right of way for all purposes is not entitled to be put in a better position than to be able to enjoy that which he had at the time the grant was made. I am not aware of any other principle on which this case can be decided. I may be met by the objection that a way of necessity must mean something more than what I have stated, because, where the grant is of the inclosed piece, the grantee is entitled to use the land for all purposes, and should therefore be entitled to a right of way commensurate with his right of enjoyment. But there again the grantee has not taken from the grantor any express grant of a right of way ; and all he can be entitled to ask is a right to enable him to enjoy the property granted to him as it was granted to him. It does not appear to me that the grant of the property gives any greater right. But even if it did, the principle applicable to the grantee is not quite the same as the principle applicable to the grantor ; and it might be that the grantee obtains a larger way of necessity—though I do not think he does—than the grantor does under the implied re-grant.”

Contempo-
raneous sales.

Rule 58.—Where two properties belonging to the same owner are sold at the same time, and each purchaser has notice of the sale to the other, the right to any continuous and apparent quasi-easement in respect of either property is the same as if it had been conveyed first; *Compton v. Richards*, 1 Pri. 27; *Swansborough v. Coventry*, 9 Bing. 305; *Allen v. Taylor*, 16 Ch. D. 355; see *per* Jessel, M.R., *Rigby v. Bennett*, 21 Ch. D. at p. 567; and *per* Cotton, L.J., *Russell v. Watts*, 25 Ch. D. 573; and *per* Fry, L.J., *ib.* 584.

It will be observed that this exception is, strictly

speaking, not a question arising on the construction of the deeds, but an application of the rule of equity, that the purchaser of property takes it subject to all equitable interests of which he has notice.

This exception does not extend to the case where two properties are put up for sale at the same auction, and one only is sold, and the other is shortly afterwards sold; *Wheeldon v. Burrows*, 12 Ch. D. 81.

On the same principle it has been held that on the sale of land to a purchaser, who had notice that adjoining land belonging to the vendor was to be laid out for building in a manner which would make a way over the purchased land necessary to the vendor, such right of way was reserved to the vendor by implication; *Davies v. Sear*, L. R. 7 Eq. 427.

Rule 59.—If the owner of land subject to a right of common acquired the tenement to which the common was appurtenant, and afterwards conveyed it to a purchaser before 1882 (*k*) the old right of common was revived and passed if the conveyance comprised all “commons, &c., therewith heretofore used and enjoyed;” but a conveyance of “all commons, &c., thereto appurtenant” was not sufficient.

Revivor of
common
appurtenant.

Cases where the word “appertaining” alone was used, and where consequently the common did not pass.—*Saundeyes v. Oliff*, Moor. 467; *Marsham v. Hunter*, Cro. Jac. 258; S. C., Yelv. 189; *Clements v. Lambert*, 1 Taunt. 205.

Cases where the words “used or enjoyed therewith” were used, and where therefore the common was held to be revived.—*Bradshaw v. Eyre*, Cro. Eliz. 570; *Worledge v. Kingswel*, Cro. Eliz. 794; S. C., 2

(*k*) See the C. A. 1881, s. 6. See note *ante*, p. 194.

And. 168; *Grymes v. Peacocke*, Bulstr. 17; but it is not revived if it is not used at the date of the conveyance; *Hall v. Byron*, 4 Ch. D. 667; where the words "or heretofore, &c.," did not occur.

The Rule does not apply to the case of a copyhold which vests in the lord by forfeiture, and is re-granted by him as a copyhold; *Badger v. Ford*, 3 B. & Al. 153; but it applies to the case of the copyholder purchasing the fee; *Marshall v. Hunter*, Cro. Jac. 253; S. C., Yelv. 183; *Fort v. Ward*, Moor. 667.

All Estate Clause.

Conveyance
of all a man's
estate and
interest
for value (l).

Rule 60.—Where a party conveys all his estate or right, or title, or interest in property to a purchaser for value, every interest vested in him will pass by the conveyance, although not vested in him in the character in which he is made a party.

"Estate."

"State" or "estate" signifieth such inheritance, freehold, term of years, tenancy by statute merchant, staple, *elegit*, or the like, as any man hath in lands or tenements, &c. And by the grant of his estate, &c., as much as he can grant shall pass. Tenant for life, the remainder in tail, the remainder to the right heirs of tenant for life, tenant for life doth grant *totum statum suum* to a man and his heirs, both estates do pass. "Right," *jus sive rectum* (which Littleton often useth) signifieth properly, and specially in writs and pleadings, when an estate is turned to a right, as by discontinuance, disseisin, &c., where it shall be said *quod jus descendit et non terra*. But "right" doth also include the estate *in esse* in conveyances; and therefore if tenant in fee simple make a lease for years, and release all his right in the land to the lessee and his heirs, the whole estate in fee simple passeth. And so commonly in fines, the right of the

"Right."

(l) See as to conveyances after 1881 the C. A. 1881, s. 63.

land includeth and passeth the estate of the land; as *A. cognovit tenementa prædicta esse jus ipsius, B., &c.* And the statute (West. 2, c. 8) saith *jus suum defendere*, which is *statum suum*. And note that there is *jus recuperandi, jus intrandi, jus habendi, jus retinendi, jus percipiendi, jus possidendi*. Title, properly (as some "Title." say) is when a man hath a lawful cause of entry into lands whereof another is seised, for the which he can have no action, as title of condition, title of mortmain, &c. But legally this word "title," includeth a right also as you shall perceive in many places in Littleton; and title is the more general word; for every right is a title, but every title is not such a right for which an action lieth; and therefore *titulus est justa causa possidendi quod nostrum est*, and signifieth the means whereby a man cometh to land, as his title is by fine or by feoffment, &c. And when the plaintiff in assize maketh himself a title, the tenant may say *veniat assisa super titulum*; which is as much as to say, upon the title which the plaintiff hath made by that particular conveyance. *Et dicitur titulus a tuendo*, because by it he holdeth and defendeth his land; and as by a release of a right a title is released, so by release of a title a right is released also. "Interest:" *Interesse* is vulgarly taken for "Interest." a term or chattel real, and more particularly for a future term; in which case it is said in pleading, that he is possessed *de interesse termini*. But *ex vi termini*, in legal understanding, it extendeth to estates, rights, and titles, that a man hath of, in, to, or out of lands; for he is truly said to have an interest in them; and by the grant of *totum interesse suum* in such lands, as well reversions as possessions in fee simple shall pass. And all these words singularly spoken are *nomina collectiva*; for by the grant of *totum statum suum* in lands all his estates therein pass. "*Et sic de cæteris*;" Co. Lit. 345a. See also *Altham's Case*, 8 Rep. 150b.

"If a man be seised of land in fee simple, or for life, or have an estate in it for years, by statute merchant, a staple, *elegit* or the like; and he grant all his estate, or

all his right, or all his title, or all his interest of and in the land; by this grant all his estate, and as much as he is able to grant, doth pass;" Shep. Touch. 98.

"This is clear, that when a person having several estates and interests in a denomination of land, joins in conveying all his estate and interest in the lands to a purchaser, every estate or interest vested in him will pass by that conveyance, although not vested in him in the character in which he became a party to the conveyance. It is true that in *Fausset v. Carpenter* (2 Dow & Cl. 282; S. C., 5 Bl. N. R. 75) the House of Lords took a different view. At the time when that case was decided, it was thought impossible to maintain the decision, and it was a subject of consideration among the profession whether it would not be advisable to bring in a short Act of Parliament to reverse it. That case cannot operate to weaken the rule of law. Nothing could be more mischievous or contrary to law than to hold that when a party professes to convey all his estate and interest in particular lands, the operation of his conveyance should be limited to the estate which was vested in him in the character in which he purported to join in the conveyance;" *per* Lord St. Leonards, C., *Drew v. Earl of Norbury*, 3 J. & L. 284; S. C., 9 Ir. Eq. Rep. 71, 524.

"*Primâ facie*, when a person conveys or settles an estate, he means to include in the conveyance every interest which he can part with and which he does not except. General words apt for that purpose are invariably used;" *per* Lord Cranworth, C., *Johnson v. Webster*, 4 De G. M. & G. 488.

Trustee having
also a benefi-
cial interest.

Exception.—Where a person has some beneficial interest in property vested in him as trustee, it may appear from the whole deed that what he intends to convey is only the interest vested in him as trustee, or only his beneficial interest, as the case may be.

A widow, entitled under her marriage settlement and otherwise to charges on her husband's estate, was one of the trustees of his will, whereby the estates were devised in trust to raise 2000*l.* for her benefit, and subject thereto, in trust to convey the estates as H. should appoint. H. borrowed money on a mortgage of one of the estates, in which the widow and her co-trustee joined, and whereby, after reciting the will and the agreement for the loan, and that H. had required the widow and her co-trustee "as such devisees in trust as aforesaid, to make such conveyance as is hereinafter contained," the widow and her co-trustee "as such devisees as aforesaid" granted the parcels with an estate clause. *Held*, that the deed did not pass the beneficial interest of the widow; *Stronge v. Hawkes*, 4 De G. M. & G. 186.

"Several cases were cited to show (what it hardly needed authority to show), that when a person assigns and conveys 'all his estate, right, title, and interest,' and all his estate, right, title, and interest are not recited in the deed, still if he has other beneficial interests in the property, they pass It is well known law that estates vested in a person in *autre droit* are so different from estates vested in him in his own right that an assignment by a person of all his goods and chattels will not pass those he holds as executor, unless he have none of his own; in which case, from the necessity of the thing, they are held to pass; the ground of that doctrine being that the two things are so clearly distinct in the party, that the intention, when he speaks of his own simpliciter, is not to pass anything which he holds in *autre droit*. But here all the conveying parties are described as executors, and are all, as such, made parties of the one part, and, as a body, convey the whole estate vested in them in the capacity in which they are so made parties If I had to determine it, I should not think myself justified in holding that a conveyance by persons described as executors, and assigning the estate they held quâ executors for the 600 years' term, would pass by force of the words 'and all the estate, right, title,

and interest,' that which one of them held for his own purposes and in his own right;" *per* Wood, V.-C., *Rooper v. Harrison*; 2 K. & J. 112.

Release by a legatee of his legacies and all actions, &c., did not extend to actions, &c., that he had in his capacity of executor; *Knight v. Cole*, Carth. 118.

*Fausset v.
Carpenter.*

The case of *Fausset v. Carpenter* (2 Dow & Cl. 282; S. C. 5 Bli. N. R. 75), stated fully by Lord St. Leonards, Law of Property, 76, can hardly be considered as contrary to this exception. There the property had become as to the beneficial interest divided into thirds; the owner of one share was the trustee in whom the legal estate in another share was vested in trust for a married woman and her husband successively for life, with remainder in trust for their children. A conveyance for value was made to a purchaser without any notice of the trusts on the conveyance or otherwise, the trustee conveying with an estate clause. It was held by the House of Lords that the legal estate vested in him as trustee did not pass, on the ground that he had two estates, one of which he might innocently and properly convey, and the other of which he could not convey without fraud and a breach of trust, and that it could not be presumed that he would intend the latter. The case has been so strongly disapproved of by Lord St. Leonards (Law of Property, 76; *Drew v. Earl of Norbury*, 3 J. & L. 284), and by Lord Hatherley (*Carter v. Carter*, 3 K. & J. 635), that it cannot be considered as bearing very high authority. It is submitted that the decision in *Fausset v. Carpenter*, is erroneous as offending against Rule I., p. 1, for it will be remembered that the fact of the conveyance by the trustee being a breach of trust, did not appear on the face of the conveyance, it was necessary to look out of the deed in order to ascertain this; in other words, the breach of trust was one of "the surrounding circumstances" which can only be looked at for the purpose of ascertaining the meanings of the words employed, not for the purpose of ascertaining what intentions the writer had.

In Lewin on Trusts, 6th edit., 198, it is said:—"In

dealings with the trust estate the Court has regard to the trust, and will not construe general words to pass the trust estate, where the assurance, if so construed, would amount to a breach of trust," and he cites *Fausset v. Carpenter*. Mr. Lewin's proposition appears to be laid down too widely, and ought to be restricted to cases where the conveyance of the estate would on the face of the assurance, amount to a breach of trust. It is submitted that the true rule as to trust estates is that laid down in the exception given above to Rule 60.

Other Exceptions.

Redeemed land tax that has not been merged (*Blundel* ^{Land Tax.} *v. Stanley*, 13 Jur. 998; S. C. 18 L. J. (Ch.) 300; *Necame* ^{Tithes.} *v. Moorsom*, L. R. 3 Eq. 91); and tithes (*Chapman v. Gatcombe*, 2 Bing. N. C. 516; 2 Scott, 738), do not pass by the estate clause; nor does a right of entry on a ^{Right of} lessee for condition broken; *Hunt v. Bishop*, 8 Ex. 675; ^{entry.} *Hunt v. Remnant*, 9 Ex. 635.

Where a release extends to all a man's estate and ^{Release.} interest, it will be controlled by the recitals; *ante*, p. 137.

In *Francis v. Minton*, L. R. 2 C. P. 543, A., being owner in fee of one moiety of a messuage and lessee of the other moiety subject to a covenant not to assign without licence, granted to B. in fee by way of mortgage, all the messuage "and all the estate, &c.," of A. in the messuage. *Held*, that only his fee simple moiety passed. But the decision was based on "the facts and the frame of the deed" (*per* Bovill, C. J., at p. 550), and especially the existence of the covenant against assignment.

A. being entitled to the entirety of property for life, with remainder as it was believed as to one moiety to B. in fee, A. and B. convey by way of mortgage "All that undivided moiety of B.," and "All the estate, &c., of A. and B." It turned out that B.'s reversionary interest was in one-fifth only. *Held*, that A.'s life interest in one-fifth only passed; *Grieverson v. Kirsopp*, 5 Beav. 283.

CHAPTER XIV (a).

HABENDUM.

Office of premises and habendum explained—Things granted named in premises only,—named in habendum only—No habendum—Grantee named in habendum only—Grant to A., habendum to A. and others—No express estate limited in premises—No express estate limited in habendum—Express estates limited both in premises and habendum.

Premises and
habendum
distinguished.

“The premises of a deed are all the foreparts of the deed before the *habendum*. . . . And the office of this part of the deed is rightly to name the grantor and grantee, and to comprehend the certainty of the thing granted. . . . And herein is sometimes (though improperly) set down the estate. . . . The *habendum* of a deed . . . doth properly succeed the premises. And the office hereof is to set down again the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have in the thing granted or demised, and to what use . . . and herein also is sometimes, though needlessly, set down again the thing granted.” . . . But “an estate may be made by a deed without any *habendum* at all;” Shep. Touch. 74, 75; Co. Lit. 6a.

“The office of the *habendum* is to limit the estate;” *Buckler's Case*, 2 Rep. 55b, and accordingly a proviso in a lease to three as joint tenants for life, “that the second shall not occupy during the life of the first, nor the third during the life of the second,” was held to be a mere col-

(a) See some cases on the habendum in leases, *ante*, Chapter VII., pp. 90, 92, 95; Chapter IX., pp. 123, 124.

lateral covenant, not altering the estate limited by the habendum; *Scovel v. Cabel*, Cro. El. 89, 107; S. C. *Scovell and Cavel's Case*, 1 Leon. 817. See also on the habendum, *Throckmerton v. Tracy*, 1 Plow. 145; Coim. Dig. Fait, E. (9) and (10); 1 Dav. Prec. (4th ed.) 99; Co. Lit. 21a, 26b, 183a, 190b, 299a, 378b.

In a deed we sometimes find that (1), the thing granted is mentioned in the premises or the habendum only; or (2), the habendum is omitted; or (3), the name of the grantee is omitted from the premises; or (4), different persons are named as grantees in the premises and the habendum respectively; or (5), a special estate having been limited in the premises, a different estate is limited in the habendum.

Rule 61.—The omission from the habendum of the thing granted will not prevent it from passing. Omission of parcels from habendum.

This rule has reference only to the question as to what parcels pass by the deed, not to the further question as to what estate the grantee takes in them. In cases within the rule, all the parcels mentioned in the premises pass, but the operation of the habendum in limiting the estate is confined to those parcels only which are again mentioned in it. *E.g.*, grant to A. of Blackacre and Whiteacre, *habendum*, Blackacre to A. and his heirs; here Whiteacre passes as well as Blackacre. A. takes an estate for life in Whiteacre by the grant in the premises, and he takes an estate in fee in Blackacre owing to the express limitation in the habendum.

In *Carew's Case*, F. Moore, 222, "Manwood, C.B., said that where there were in one deed several things granted, and then comes the *habendum* to limit the estate, if the *habendum* recites all those things by particular reference [*Qy. 'arrear particularment'*], it does something which is not its office and is superfluous, and therefore all that recital shall be of no effect; but the *habendum* shall be construed as if there had been no such recital, nor anything beyond '*habendum et tenendum*,' but where a

deed or demise contains several limitations of estate, *e.g.*, one of certain parcels of the premises for twenty years, and another of other parcels for ten years, or for life, there the certainty of the different *habendums* is to be regarded, but not so where there is but one *habendum*."

See the annotation of Lord Hale given in Co. Lit. 26*b*, note 4; see also Dal. 57, pl. 3.

"If the thing granted be left out in all, or in part in the *habendum*, yet the grant is good by force of the premises. And therefore if one grant land to A., *habendum* (without naming the land), to A. and his heirs, &c, or if one grant Whiteacre and Blackacre to A., *habendum*, Whiteacre to A. and omit Blackacre; yet these deeds are good, and all that is contained in the premises of the deed doth pass in both cases;" Shep. Touch. 76.

Omission of
parcels from
premises.

Rule 62.—If the thing granted be named in the *habendum* only, and not in the premises, it will not pass.

This rule is laid down in Shep. Touch. 75, on which Mr. Preston says: "Probably this proposition is too general." Shep. Touch. *l.c.* continues, "And therefore if a man grant Blackacre only in the premises of a deed, *habendum* Blackacre and Whiteacre, Whiteacre will not pass by this deed." This passage is cited with approval in 1 Dav. Prec. 4th edit. 101.

"The King being seised of a manor in fee to which an advowson was appendant, granted the same manor to two for their lives, and afterwards the King reciting the grant for life, granted that the said manor, after their deaths, should remain to two bishops, *habendum et tenendum omnia prædicta terras et tenementa, una cum advocacione ecclesie prædictæ, &c.*, and it was held by all the Justices that by the lease of the manor the advowson did not pass, because nothing was spoken of it in the grant, but it remained in the King as in gross, and not appendant in right nor in possession; and it was also held that the advowson should not pass to the bishops, because nothing was spoken of

the advowson in the grant, but in the *habendum*, and that nothing shall pass in the *habendum* if it be not spoken of in the grant, except it be a thing appendant or appurtenant;" *Rex v. Abbess of Sion*, 38 H. 6, 33 B.; cited 1 Plowd. 152. See other cases to the same effect, *Viner*, "Grants," I. a. pl. 5.

Observation.—Of course the rule does not apply where the thing newly mentioned in the *habendum* is impliedly mentioned in the premises.

"If one grant a manor, *habendum* the manor with the advowson appendant to the manor, or if one grant a reversion of land, by the name of a reversion in the premises, *habendum* the land itself (*Throckmerton v. Tracy*, 1 Plow. 145; S. C. Dyer, 123*b*, pl. 40); in both these cases the deed is good, and the advowson and reversion will pass, for they were in effect and in point of law included in the former description;" Shep. Touch. 76.

Conveyance of land, with the right to use a wall, to A., subsequent conveyance of the land, *habendum* "with the appurtenances:" *held*, that the right to use the wall passed; *Renwick v. Daly*, Ir. R. 11 C. L. 126.

Rule 63.—If there is no habendum, the grantee takes the estate limited in the premises, and if no person is mentioned as grantee in the premises, the person mentioned as grantee in the habendum takes the estate limited by the habendum.

No habendum
or no grantee
mentioned in
the premises.

"If an estate and interest is mentioned in the premises, the intention of the parties is shown, and the deed may be effectual without an habendum;" *per* Abbott, C. J., *Goodtitle d. Dodwell v. Gibbs*, 5 B. & C. 717; S. C. 8 D. & Ry. 502; see also *Kerr v. Kerr*, 4 Ir. Ch. R. 498, 497.

Where no
habendum.

"An estate may be made by a deed without any *habendum* at all. As if one give or grant land to another and his heirs, without any more words in the deed, or if

Grantee mentioned in habendum only.

one give or grant land to another and limit no estate, without any *habendum* in the deed, and seal and deliver this deed, and make livery accordingly; in both these cases the deed is good, and in the first case an estate in fee simple is made, and in the last case an estate for life is made. And if the name of the grantee be not contained in the premises, yet if it be in the *habendum*, it may be good enough. As if one give or grant land *habendum* to B. and his heirs, and he is not named in the premises, yet this is a good deed to make an estate in fee simple;" Shep. Touch. 75.

"If A. give lands to have and to hold to B. and his heirs, this is good, albeit the feoffee is not named in the premises;" Co. Lit. 7a; see *Eeles v. Lambert*, Al. 38, and *Butler v. Dodton*, Cary, Rep. in Ch. 123.

In *Spyre v. Topham*, 3 East, 115, the Court of King's Bench first rejected some words from the premises which would have made the deed inoperative, and then supported the deed from finding the name of the grantee in the *habendum*. See further Co. Lit. 26b, note (4), "Where one named after the *habendum* shall take."

Grant to A. habendum to A. and B. (b).

Rule 64.—Where a person is mentioned as grantee in the premises, and is mentioned together with others in the *habendum*, he alone can take an immediate estate.

Conveyance followed by feoffment "unto J., habendum to J. and G. and their heirs." Held that, forasmuch as G. was not named in the premises, he could take nothing in the *habendum*, and that the feoffment was good as to J. and his heirs;" *Sammes' Case*, 13 Rep. 54.

Demise to A., habendum to A., B., C., and D., "*pro termino vite eorum et alterius eorum successive diutius viventium*." Held, that A. alone took, as B., C., and D., not being named in the premises, could only take in remainder, which could not be joint because of the words *suc-*

(b) In this and the subsequent Rules in this chapter the effect of the declaration of uses (if any) is neglected. See 1 Sand. Us. 140.

cessive, &c., and in succession they could not take for the uncertainty who should begin; *Windsmore v. Hobart*, Hob. 313; S. C. under slightly different names, Godb. 51; Hut. 87; Cro. El. 58; Ow. 39. See also *Tyler v. Fisher*, Palm. 29.

Lease made to two, *habendum* to them and two others for lives. *Held*, that the two mentioned in the *habendum* only took nothing; *Kirkman and Reynold's Case*, 2 Leon. 1. Demise to C. *habendum* to C. and D. for years rendering rent. *Held*, that D. took nothing; *Reynold v. Kingman*, Cro. El. 115.

Release by lord of a manor of a copyhold to the tenant on the roll, *habendum* to the tenant and G., their heirs and assigns; and livery made according to the intent of the indenture: *held*, that as G. was not named in the premises, he could take nothing by the *habendum*, and that the livery made according to the indenture, did not give anything to G., because the indenture as to him was void; *Sammes' Case*, 13 Rep. 54.

Exception.—A person not named in the premises can take an immediate estate in the *habendum*, (1) in case of frank marriage; (2) under a customary grant by copy; *Brooks v. Brooks*, Cro. Jac. 434; S. C. 2 Roll. Ab. 67; see the authorities collected, Co. Lit. 26*b*, note (4).

Observation.—Where a particular estate is limited by the *habendum* to the person named as grantee in the premises, with remainder over to a person not named in the premises, the latter can take; *Veners v. Abbot of Fesch*, Pasch. 8 Ed. 2, 267; see *Kerr v. Kerr*, 4 Ir. C. R. 493; S. C. 7 Ir. Jur. 76; *Burton*, Comp. s. 518; Co. Lit. 27*a*, note (4).

Rule 65.—Where no express estate is limited in the premises, and an express estate is limited in the *habendum*, the grantee takes the latter estate, and if that estate be contrary to the rules of law, the deed will be void.

Remainderman mentioned in *habendum* only.

Where no express estate is limited by premises.

“ If one grant to one, to have and to hold to him and his right heirs, by this he hath a fee simple ;” Shep. Touch. 102.

“ If in the premises lands be letten or a rent granted (not making mention of what estate), the general intendment is that an estate for life passeth, but if the habendum limit the same for years or at will, the habendum doth qualify the general intendment of the premises ;” Co. Lit. 183a.

“ If a man grants a rent and goes no farther, these general words shall create an estate for life, but if the habendum be for years, it shall qualify the general words ;” *Altham's Case*, 8 Rep. 154b.

“ If by your premises you have given no certain nor express estate than that otherwise the law would give, you may alter and abridge, nay you may utterly frustrate it by the *habendum* ;” *Stukeley v. Butler*, Hob. 170, 171.

“ If no estate be mentioned in the premises, the grantee will take nothing under that part of the deed, except by implication and presumption of law ; but if an habendum follow, the intention of the parties as to the estate to be conveyed will be found in the habendum, and consequently no implication or presumption of law can be made ; and if the intention so expressed be contrary to the rules of law, the intention cannot take effect, and the deed will be void ;” *Goodtitle d. Dodwell v. Gibbs*, 5 B. & C. 717 ; 8 D. & R. 502.

“ If one grant land, rent, common, or any such like thing, to one in the premises of the deed, without limitation of estate (which in judgment of law is an implied estate for life), to have and to hold to him for a certain number of years, or at will ; this *habendum* is good, and shall stand with the premises and qualify it [or rather explain it] ; and by this gift the grantee shall have but a lease for years, or at will, as the *habendum* is ;” Shep. Touch. 118.

Grant by tenant for life of a term to J., and afterwards grant by tenant for life to C., *habendum* from a future

day for life. *Held*, that the grant was void, as an estate of freehold cannot commence *in futuro*. "The habendum in this case is not contrary to the premises; for no certain estate is contained in the premises, but generally the land given and granted, which might be qualified by the habendum to an estate for years, or at will. For the office of the premises of a deed of feoffment is to express the grantor, grantee, and thing to be granted, and the office of the habendum is to limit the estate; so that the general implication of the estate which shall pass by construction of law, by the premises, is always controlled and qualified by the habendum. As a lease to two, habendum to one for life, remainder to the other for life, will alter the general implication of joint tenancy of the freehold, which without any habendum would be made. And although the habendum be void, and so in effect as no habendum, yet no estate shall pass by implication of law against the express limitation of the party, although his limitation be void;" *Buckler's Case*, 2 Rep. 55a.

Feoffment to G., habendum after the death of the feoffor to G. in tail, livery *secundum formam*; *held*, void: *aliter* of the grant of a term to A., habendum after the death of the grantor, in which case the term passes by the premises; *Hogg v. Cross*, Cro. Eliz. 254.

Demise and grant to A. and B. habendum "to A. and B., their heirs and assigns from the 1st November preceding for the lives of B., C., and D., or for 999 years, or for ever, which should longest last," at a yearly rent, "payable half yearly during the said term." *Held*, to be a grant in fee farm; *Twaddle v. Murphy*, 8 L. R. Ir. 123.

Rule 66.—If both the premises and the habendum contain different *express* limitations of the estate, the limitation in the habendum will, if possible, be considered as explanatory of that in the premises (Rule 16); but if the limitations are repugnant, they

Express
limitations
in both
premises and
habendum.

will be construed in the manner most beneficial to the grantee (Rule 21).

The latter part of the Rule is sometimes expressed as follows: "The habendum may extend but not abridge the estate limited in the premises."

"The office of the habendum is to explain, limit, and declare the *quantum* of the estate which is to pass by the deed. It has never been disputed but that it will carry the limitation of the estate farther than the premises of the deed did. If a man gives an estate for life, habendum to him and his heirs, a fee simple clearly-passes. On the other hand, it is clear that the habendum never abridges the estate granted by the premises of the deed; it may indeed alter and vary it, as if a man grants an estate to A. and B., to have and to hold to A. for life, the remainder to B., the premises of the deed will be controlled by the habendum;" *Kendal v. Micfeild*, Barn. Ch. Rep. 46.

Of course, part of the habendum may be explanatory of the limitation in the premises, while other part may be repugnant and have to be rejected; *Doe d. Timmis v. Steele*, 4 Q. B. 663.

Habendum explaining premises.

"Heirs" in the premises explained to mean "heirs of the body."

Examples where the estate limited in the habendum was construed as explaining that limited in the premises.—"If a man gives lands to one and his heirs habendum to him and the heirs of his body, he shall have an estate tail and no fee expectant;" *Altham's Case*, 8 Rep. 154*b*. See Co. Lit. 21*a*; Preston, Shep. Touch. 102, 113. In *Tithnman v. Cooper*, Cro. Jac. 476; S. C. 2 Rol. Rep. 19, 23; S. C. sub nom. *Thurman v. Cooper*, Pop. 138; these words were held to give an estate tail with a remainder in fee; but in that case the construction was made on the whole deed, which was inconsistent with an estate tail only being intended.

To mean "special occupants."

In *Pilsworth v. Pyet*, T. Jones, 4; and in *Doe d. Timmis v. Steele*, 4 Q. B. 663; *Lynch v. Nelson*, Ir. R. 5 Eq. 192, the word "heirs" in the premises was explained by the habendum to mean "special occupants."

In *Earl of Derby v. Taylor*, 1 East, 502, an estate *pur autre vie*, and in *Barton v. Barclay*, 7 Bing. 745, a term granted by the premises, was restricted by the habendum (in each of these cases the facts were somewhat special). Estate *pur autre vie* and term restricted.

Owner of rent-charge *pur autre vie* grants to "A., his executors, &c., habendum to A., his heirs and assigns," during the lives. *Held*, that both executors and heirs were special occupants; the word "heirs" was explanatory only of the class of special occupants who were to take; *Kendal v. Micfeild*, Barn. Ch. Rep. 46. Special occupant explained.

Lease of land to three for their lives, *habendum* to one for life, remainder to another for life, remainder to the third for life. *Held*, that they took successively for life; *Anon.*, Dy. 160b (pl. 48); S. C. sub nom. *Dowse's Case*, Cro. El. 25; see Co. Lit. 183b. Lease to husband, wife, and a third person, *habendum* to the husband for 80 years if he should so long live, and if he should die within the term, remainder to the wife and the third person if they should so long live. *Held*, good; F. Moo. 43. pl. 133. Joint estate controlled.

Even if the habendum is void, it may be looked at together with other parts of the deed for the purpose of qualifying the estate limited by the premises; *Hagarty v. Nally*, 19 Ir. C. L. R. 532.

Examples where the estate limited in the habendum enlarged that in the premises.—"If a man in the premises give land to another and the heirs of his body, habendum to him and his heirs for ever, he takes an estate tail and a fee simple expectant;" Co. Lit. 21a. (It is said *Kendal v. Micfeild*, Barn. Ch. Rep. (at p. 49) that it is fee simple; possibly Coke's opinion may be supported on the ground that estates in tail and in fee may co-exist in the same person.) Habendum enlarging premises.

Examples where, the estate limited in the habendum being less than that limited in the premises, or repugnant to some rule of law, the habendum was rejected.—"If the grant is to one and his heirs, *habendum* for life, the habendum is void, because it gives a lesser estate If a man grants to another an annual rent Habendum rejected.

of 20s. payable yearly at the feasts of the Annunciation of Our Lady and of St. Michael, *habendum* for a day, this is a void habendum, because the premises of the deed grant an annual rent and payable at two days, and now by the *habendum* it shall not be annual nor payable at any day, and therefore it is repugnant;” *Throckmerton v. Tracy*, 1 Plow. 152a (arguendo).

Where A. conveyed freeholds to B. and his heirs, habendum to B., his heirs and assigns after the death of A., the habendum, which was void as giving an estate *in futuro*, was rejected; *Goodtitle d. Dodwell v. Gibbs*, 5 B. & C. 709; S. C. 8 D. & Ry. 502; *Carter v. Madgwick*, 3 Lev. 339.

In *Goshawke v. Chickell*, W. Jones, 205, where J. assigned a term to B., *habendum* to J., and his wife for their lives, with remainder to B. till her marriage and birth of issue, and afterwards to B., her executors, &c., for the residue of the term; in *Jerman v. Orchard*, Skin. 528 (see p. 542); S. C. Show. P. C. 199; S. C. 1 Salk. 346, where a term was assigned to B., her executors, &c., *habendum* after the death of the grantor and his wife; in *Lilley v. Whitney*, Dy. 272, pl. 30, where a term was assigned to A., habendum to him, his heirs and assigns, after the death of the grantor, the habendum was rejected, and the assignee took the estate given by the premises.

Assignment of a ship in course of building to A., habendum to A., when it shall be complete. *Held*, that the habendum might be rejected; *Reed v. Fairbanks*, 13 C. B. 692.

Grant to A. and B., habendum to B.; the habendum was rejected; *Cochin v. Heathcote*, 10ff, 190.

R., being tenant for life of a house, by a deed of 10th November “granted, demised, and leased to J., his executors, administrators, and assigns,” the house, *habendum* “to J., his executors, administrators, and assigns, from the 13th November for the term of R. for the term of his natural life.” *Held*, that having regard to the interest which the grantor had, there was in the

premises an express grant of the life estate *in presenti*, which was not controlled by the habendum; *Boddington v. Robinson*, L. R. 10 Ex. 270.

Observation.—Where the estates limited in the premises and the habendum are not the same, and some further act, besides the delivery of the deed, is necessary to perfect one of them, while the other takes effect by the delivery alone, then the latter estate only is effectually limited.

In *Baldwin's Case*, 2 Rep. 23a, land was demised to A. and B. and the heirs of B., *habendum* to them for 99 years from the date of the indenture. It was *held*, “*First*, when to things which take their essence and effect by the delivery of the deed without other ceremony, and which lie in grant, there, in such limitation as in the case at Bar, the *habendum* was repugnant and void; as if a man grants rent or common, &c., out of his land, by the premises of the deed to one and his heirs, *habendum* to the grantee for years, or for life, the *habendum* is repugnant; for a fee passeth by the premises, by the delivery of the deed, and therefore the *habendum* for years, or life, is void. *Second*: If one by deed grants rent *in esse*, or a seignory, in the premises to one and his heirs, *habendum* to the grantee for years or life; although another thing, or ceremony, is requisite, that is to say, attornment (*b*), besides the delivery of the deed, yet, forasmuch as the thing lieth in grant, and both estates, that is to say, as well the estate in fee as the estate for years or for life, ought to have one and the same ceremony, that is to say, attornment, to pass it, as a seignory, &c., and for this cause the *habendum*, in such case, is repugnant and void. *Third*: When a man gives land by deed in fee by the premises, *habendum* to the lessee for life, there the *habendum* is void, as hath been said; for one and the same ceremony

(b) The necessity for attornment is done away with by 4 & 5 Ann. c. 16.

scil. livery (c) is requisite to both the estates; and therefore, when livery is made according to the form and effect of the deed, it shall be taken strongest against the feoffor, and more for the advantage of the feoffee; and the *habendum* in such case is void, and till livery be made, the feoffee hath but an estate at will. *Fourth*: When to the estate limited by the premises, a ceremony is requisite to the perfection of the estate, and to the estate limited by the *habendum* nothing is required to the perfection and essence thereof, but only the delivery of the deed, there, although the *habendum* be of a lesser estate than is mentioned in the premises, the *habendum* shall stand, as in the case at the Bar: to the fee simple limited by the premises, it is requisite to have livery and seisin; and till livery be made, nothing shall pass but an estate at will (if the deed had not gone farther), and therefore the *habendum* for years is good presently by the delivery of the deed, and so it appeareth it was the intent of the parties that it should take effect, by the delivery of the deed, for years." See *Hogg v. Cross*, Cro. Eliz. 254. As livery is no longer necessary, the fourth case if it now occurred would probably be decided differently. See 3 Day. Prec. 102.

(c) Not now necessary, 8 & 9 Vict. c. 106, s. 2.

CHAPTER XV (a).

ESTATES OF INHERITANCE.

Limitations "to A. and his heirs"—"Heir," in the singular—Omission of "his"—Word "heirs" rejected—Fee without the word "heirs"—The King—Corporations—Releases—Fee by reference—Partitions—Fines and Recoveries—"Heirs" of a deceased person—"Heirs" of the grantor—"Heirs" of a living person who is not the grantor—A. "or" his heirs—Qualification added to heirs—"A. and the heirs of his body"—"Heir" (in the singular) of body—Words "of his body" implied or supplied by context—Limitation in default of heirs of A. to B. who is capable of being A.'s heir—Designation of person from whom the heirs are to proceed—"Begotten"—"To be begotten"—Estate tail created by reference—"Male" supplied by context—Heirs. of body of deceased person—of living person—"A. and the heirs of the body of B."—Limitation to husband, or to wife, and the heirs of the bodies of husband and wife—To A. and B. and the heirs of their bodies—In marriage settlement, "heirs," or "heirs of the body," extended by parenthesis, &c., to all children—Fee simple conditional in copyholds—Rule in Shelley's Case—Where estate of ancestor may determine in his own lifetime—Ancestor taking estate of freehold by implication—Copyholds—Limitations to heir and ancestor must be in the same instru-

(a) See *post*, Chapter XVI., DEATH WITHOUT ISSUE, and Chapter XVII., HEIRS AS PURCHASERS; and as to equitable interests, see Chapter XVIII., Rule 104.

ment—One limitation legal, the other equitable—Words added to limitation to ancestor—Words of limitation or distribution added to limitation to heirs—Conditional and determinable fees—A. and his heirs for years—A. and his heirs for life of B.—Estate gained by entry under power—Lease, or grant of rent till certain sum is paid.

Estates in Fee Simple.

“A. and his heirs.”

Rule 67.—A limitation of lands, tenements, or hereditaments “to A. and his heirs,” or “to A., his heirs and assigns,” or “to A., and the heirs of the said A.,” or “to A., and the heirs and assigns of A.,” vests an estate in fee simple in A. as a purchaser: and in deeds prior to 1882 no estate in fee simple could be created without the word “heirs,” but in deeds after 1881 an estate in fee simple can be created by a limitation to A. “in fee simple;” see the Conveyancing and Law of Property Act, 1881, 44 & 45 Vict. c. 41, s. 51.

“If a man would purchase lands or tenements in fee simple, it behoveth him to have these words in his purchase, ‘to have and to hold to him and to his heirs:’ for these words ‘his heirs’ make the estate of inheritance. For if a man purchase lands by these words, ‘to have and to hold to him for ever;’ or by these words, ‘to have and to hold to him and his assigns for ever;’ in these two cases he hath but an estate for term of life, for that there lack these words, ‘his heirs,’ which words only make an estate of inheritance in all feoffments and grants;” Litt. s. 1.

“A. in fee simple.”

“If one grant,” before 1882, “to J. S., to have and to hold to him in fee simple, or in fee tail, without saying ‘to him and his heirs,’ or, ‘to him and his heirs

males,' or the like, this is but an estate for life

So if one grant land to J. S., to have and to hold to him and his seed, or to him and his issue generally, by this grant is made only an estate for life;" Shep. Touch. ^{"A. and his issue."}

106. A grant to a natural person and his successors gives only an estate for life; Shep. Touch. 106. ^{"A. and his successors."}

The rule applies even in the case of a bastard, all of whose heirs must be heirs of his body; Co. Litt. 8b.; *Idle v. Cook*, 1 P. Wms. 78. ^{Bastard.}

Observation.—A limitation to "A. and his heir" is not fee in A.; see *post*, Chapter XVII., ^{"Heir" in the singular.}
"HEIRS AS PURCHASERS."

"If a man give land to a man and to his heir in the singular number, he hath but an estate for life, for his heir cannot take a fee simple by descent, because he is but one, and therefore in that case his heir shall take nothing;" Co. Lit. 8b.; see *Waker v. Snowe*, Palm. 359; *Chambers v. Taylor*, 2 My. & Cr. 376. Mr. Hargrave, in his note on the passage in Coke, says: "According to many authorities, 'heir' may be *nomen collectivum* as well in a deed as in a will, and operate in both in the same manner as 'heirs' in the plural number." But the cases that he cites are all cases of wills, with the possible exception of the case in Godbolt, which is merely a *dictum*, as to which it does not appear whether it refers to a will or a deed. But "heir or heirs" gives the fee; *Bony v. Taylor*, 2 Roll. 253; S. C., 16 Vin. 213; *Parols*, H. pl. 3. ^{"Heir or heirs."}

"If a man give land unto two, to have and to hold to them two *et hæredibus*, omitting *suis*, they have but an estate for life, for the uncertainty. But it is said if land be given to one man, *et hæredibus*, omitting *suis*, that notwithstanding the fee simple passeth;" Co. Lit. 8b.; see also Plow. 28, 29. See *ante*, p. 112. ^{"His" omitted.}

Observation.—The context may show that the word "heirs" is to be rejected. ^{Word "heirs" rejected.}

By a marriage settlement freeholds were vested in trustees "to hold to the use of A., his heirs and assigns, from the perfection of these presents for and during the term of his natural life;" then followed a limitation to trustees to preserve, &c., and other usual provisions in a strict settlement." *Held*, that A. took an estate for life only; *Re Hammersly*, 11 Ir. C. R. 229; 12 Ir. C. R. 819.

The king.

First Exception.—The king may take lands "to him and his heirs," in which case he takes in his capacity as a man; or he may take "to him and his heirs kings of England," or "to him and his successors kings of England," in which case he takes in his capacity as a body politic; in either case he takes a fee simple; *Willion v. Berkley*, Plow. 234 (*arg.*). The king may also take a fee simple by deed enrolled without the word "heirs" or "successors;" Co. Lit. 9*b*.; Grant on Corporations, 627.

Corporation
sole (*b*).

Second Exception.—A gift to a corporation sole and his *successors* passes the fee; Co. Lit. 8*b*. And without the word *successors* a life estate only passes, even if the gift be to the corporation and his heirs; Co. Lit. 94*b*, note 4.

Third Exception.—A gift to a corporation sole in frankalmoine passed the fee without any words of limitation; Co. Lit. 93*b*.

Corporation
aggregate (*b*).

Fourth Exception.—A gift to all a corporation aggregate, where all the corporation can take, passes the fee without any words of limitation; 11 H. 4, 84; 11 H. 7, 12, and 27 H. 8, 15; but if

Corporation
sole vacant.

(*b*) As to effect of a grant made while a corporation sole is vacant, or while there is no capable member of a corporation aggregate; *Holden v. Smallbrooke*, Vau. at p. 199; Co. Lit. 264*a*.

only one of the corporation can take, the word "successors" appears to be necessary; Co. Lit. 94*b*.

Fifth Exception.—The rule does not apply to Release. certain releases: "First, when an estate of inheritance passeth and continueth, as if there be three coparceners or joint tenants, and one of them releases to the other two, or to one of them, generally, without these words 'heirs;' secondly, when an estate of inheritance passeth and continueth not, but is extinguished, as when the lord releaseth to the tenant, or the grantee of a rent releaseth to the tenant of the land generally all his right, &c., hereby the seignory, rent, &c., are extinguished for ever, without these words 'heirs:;' thirdly, when a bare right is released, as when the disseisee release disseisor all his right, he need not speak of his heirs;" Co. Lit. 9*b*. See *ib*. 193*a*; Shep. Touch. 327.

Sixth Exception.—A fee may be limited by Fee by reference. words of reference; Co. Lit. 9*b*; *Garde v. Garde*, 3 Dr. & War. 435; S. C. 2 Con. & L. 175.

A fee simple may be well limited by deed by reference to limitations contained in another instrument, provided that the words in the latter instrument are apt and sufficient in law to create a fee simple in an instrument of that nature, ex. gr., conveyance by reference to the uses declared by a will where the word "heirs" is not used.

Seventh Exception.—"If partition be made Partition. between coparceners of lands in fee simple, and for owelty of partition one grant a rent to the other generally, the grantee shall have a fee simple without this word 'heirs;'" Co. Lit. 10*a*; Plowd. 134 (*arg.*). See Co. Lit. 193*a*.

Fine and
recovery.

Eighth Exception.—An estate in fee simple could be created by a fine *sur conusans de droit*, &c., or by a recovery without the word "heirs;" Co. Lit. 9*b*.

C. A. 1881,
s. 34.

Ninth Exception.—Declarations vesting property in new trustees under the C. A., 1881, s. 34.

See other exceptions, Vincr, "*Estates*," K. & L.

Limitation to
heirs or heir
of deceased
persons (c).

Rule 68.—A limitation to the heirs of a deceased person confers a fee simple on the person who happens to be his heir, descendible as if the deceased person had been the purchaser; Year Book, 11 H. 4, 74; cited Williams on Real Property, Part 2, Chapter 2, note; *Marshall v. Peascod*, 2 J. & H. 73. See 3 & 4 Will. 4, c. 106, s. 4.

Observation.—The rule applies where the word is "heir" in the singular; *Marshall v. Peascod*.

Remainder to
heirs of
grantor (d).

Rule 69.—A limitation, either at Common Law or under the Statute of Uses, in remainder to the heirs of the grantor leaves the reversion in fee simple in the grantor, even if no prior estate of freehold is given to him by the conveyance; see Fearn, C. R. 51; Burton, sec. 335. But as to such a limitation after 1833, see 3 & 4 Will. IV. c. 106, s. 3.

"If a man seised of lands in fee make a feoffment in fee, and depart with his whole estate, and limit the use to his daughter for life, and after her decease, to the use of his son in tail, and after to the use of the right heirs of the feoffor; in this case, albeit he departed with the

(c) As to the effect of a conveyance to A. (who is the heir-at-law of B.), and the heirs of B., see Co. Lit. 220*b*; 3 & 4 W. IV., c. 106, s. 4. As to a limitation to "the heirs of A. and B." where A. is dead and B. alive, see *Haves v. Haves*, 14 Ch. D. 614.

(d) See as to remainder to heirs of the body of the grantor, *post*, Rule 76.

whole fee simple by the feoffment, and limited no use to himself, yet hath he a reversion ;" Co. Lit. 22b. Lord Coke goes on to explain that the grantor takes an implied use during his life, so that the heirs could not be purchasers. See to the same effect, *Fenwick v. Mitforth*, Moore, 284 ; S. C. 1 Leon. 182 ; sub nom. *Read v. Erington*, Cro. El. 321. See also *Bingham's Case*, 2 Rep. 82b ; *Abbot v. Burton*, Salk. 590 ; S. C. 11 Mod. 181 ; Com. Rep. 160 ; *Godbold v. Freestone*, 3 Lev. 406.

It used to be thought that the rule did not apply to the Copyholds. surrender of a copyhold, so that where A. surrendered to the use of B. for life with remainder to the right heirs of A., the heirs of A. took by purchase : *Allen v. Palmer's Case*, 1 Leon. 101 ; but this view appears to be incorrect, see *Fearne, C. R. 67 et seq.*

The rule is the same where the limitations are such that no estate of freehold arises in the ancestor by implication (see Rule 112, *post*, p. 287).

Where no estate of freehold implied in ancestor.

F. made a feoffment in fee to the use of himself for years, remainder to the use of J., then his second son, and the heirs male of his body, remainder to the use of the right heirs of F. : *Held*, that the limitation of the use of the heirs of the feoffor was the old use, and was executed in the feoffor as the reversion in fee, and not as a remainder : *Bedford v. Russell*, Pop. 3 ; S. C. Moore, 718 ; cited 1 Rep. 180a. ; *Godbold v. Freestone*, 3 Lev. 406.

But where there is a direction to convey in certain events to the heirs of the grantor, the person who on the happening of those events is his heir takes as purchaser ; *Bush v. Locke*, 3 Cl. & Fin. 721. See *Davis v. Kirk*, 2 K. & J. 391.

Executory trusts.

Rule 70.—A limitation in remainder to the heirs of a living person, who is not the grantor, and who takes no prior estate of freehold, confers a contin-

Remainder to heirs of stranger.

gent remainder in fee simple on the person who is his heir at law at his death. See Wms. Real P. Part 2, Chap. 2; *Sir Thomas Tipping's Case*, cited 1 P. W. 359; S. C. sub nom. *Tipping v. Piggot*, 1 Eq. Ca. Ab. 385, pl. 2; Gilb. Eq. 34; Co. Lit. 378a.

"If a lease for years be made to A. the remainder to B. in tail, the remainder to the right heirs of A., there the remainder vesteth not in A., but the right heirs shall take by purchase if A. die during the estate tail;" Co. Lit. 319b. See *Tapner d. Peckham v. Merlott*, Willes, 177.

A. or his
heirs.

Rule 71.—An immediate limitation to "A. or his heirs" gives an estate for life only to A.; Co. Lit. 8b; *Mallory's Case*, 5 Rep. 111b; but such a limitation in remainder is, it is submitted, an alternative limitation, viz., a vested remainder to A. for life, and a contingent remainder in fee simple to the heir of A. which becomes vested if A. die before the prior estates determine.

Qualification
added to
heirs (d).

Rule 72.—A qualification added to the "heirs," in a limitation to "A. and his heirs," or "A. his heirs and assigns," such as "male," or "lawfully issuing" (without stating from whom they are to issue), does not cut down A.'s estate from a fee simple to an estate tail.

"If a man give lands or tenements to another, to have and to hold to him and to his heirs males, or to his heirs females, he to whom such a gift is made hath a fee simple, because it is not limited by the gift of what body the issue male or female shall be:" Lit. s. 31.

(d) As to heirs, with a qualification, taking by purchase, see *post*, p. 254.

“Right heirs males ;” *Doe d. Brune v. Martyn*, 8 B. & C. 497 ; S. C. 2 Man. & Ry. 485. “Heirs males lawfully engendered :” *Abraham v. Twigg*, Cro. El. 478 ; S. C. Moore, 424.

“If lands be given to the son and to his heirs of the body of his father, the son cannot take as heir of the body of his father, because the grant is to him and to his heirs, and consequently he hath a fee simple ;” Co. Lit. 27a ; the words “of the body of his father,” being rejected as repugnant. See *post*, p. 237.

Exception.—A grant by the Crown to A. and his heirs male is absolutely void ; *Lord Lovel’s Case*, 18 H. 8 ; Br. Tit. *Patents*, pl. 104, cited 1 Rep. 43b, 46a ; “For that the King is deceived in his grant, inasmuch as there can be no such inheritance of lands or tenements as the King intended to grant ;” Co. Lit. 27a.

As to the effect of the limitation of a peerage to heirs male, see the *Earl of Devon’s Case*, 2 Dow & C. 200 ; *Wiltes Peerage*, L. R. 4 H. L. 126 ; and as to a grant of armorial bearings to a man and his heirs male, see Co. Lit. 27a.

Estates tail.

Rule 73.—A limitation to “A. and the heirs of his body” vests an estate tail in him as a purchaser, and in deeds prior to 1882 an estate tail could not be created without the words “heirs of the body ;” but in deeds after 1881 an estate tail can be created by a limitation to A. “in tail.” See the Conveyancing and Law of Property Act, 1881, 44 & 45 Vict. c. 41, s. 51.

“In gifts in tail these words ‘heirs’ are as necessary

as in feoffments and grants; for seeing every estate tail was a fee simple at the common law, and that at the common law no fee simple could be in feoffments and grants without these words ‘heirs,’ and that an estate in fee tail is but a cut or restrained fee, it followeth that in gifts in a man’s lifetime no estate can be created without these words ‘heirs,’ unless it be in case of frank marriage;” Co. Lit. 20a.

“Heir” of
body in the
singular (e).

The only case that I have been able to find of an estate tail being created by the word “heir” of the body in the singular in a deed is the case 39 Ass. pl. 20 (cited in Co. Lit., 22a, and *per* Hale, C. J., 1 Vent. 228), where lands were given to a man and his wife, and one heir of their bodies lawfully begotten, and to one heir of the body of that heir only: and it was held to be tail; see S. C. Bro. Abr. “Estate,” pl. 38; *ib.* “Tail,” pl. 23; Perkins, s. 171; Fitzh. Abr. “Tail,” pl. 19: and see *Warrick v. Warrick*, 3 Atk. 291. See this point discussed in 1 Co. Rep. by Fraser, p. 164, note (Y), (*Archer’s Case*): *Dubber v. Trollope*, Amb. 457; *Bayley v. Morris*, 4 Ves. 788; *Chambers v. Taylor*, 2 My. & Cr. 376; and *White v. Collins*, Com. Rep. 289 (the case of a devise).

“Heir or
heirs of body.”

But “heir or heirs of his body,” is tail; *Bony v. Taylor*, 16 Vin. Abr. 213, “Parols,” H. 3; S. C. 2 Roll. 253.

“Heirs”
necessary (f).

The use of the word “heirs” is (in deeds prior to 1882) absolutely necessary.

Thus, a limitation to “A. and his issue male of his body,” to “A. and for want of issue of his body,” remainder over, is not an estate tail; *Nevill v. Nevill*, 1 Brownl. 152; *Seagood v. Hone*, Cro. Car. 366; *Makepiece v. Fletcher*, 2 Com. Rep. 457; *Wheeler v. Duke*, 1 Cr. & M. 210; S. C. 3 Tyr. 61. See *per* Kindersley, V.-C., *Phillips v. James*, 2 Dr. & Sm. 411. See also *Dawson v. Dawson*, 13 Ir. L. R. 472.

(e) See *ante*, p. 225. See also *post*, Chapter XVII., p. 252.

(f) The use of the word heirs was not always necessary in a gift in frank-marriage; Co. Lit. 21a, *et seq.*

The words "of his body" may be supplied by implication or the context. "Of the body" supplied by implication (g).

Examples.—"The example that the statute of Westminster Second putteth hath not these words, '*de corpore*,' but these words '*heredibus*,' viz., *Cum aliquis dat terram suam alicui viro et ejus uxori et heredibus de ipsis viro et muliere procreatis*;" Co. Lit. 20b.

"If lands be given to B., *Et heredibus quos idem B. de "De." prima uxore sua legitime procrearet*," this is a good estate in special tail (albeit, he hath no wife at that time) without these words, "*de corpore*." So it is if lands be given to a man and to his heirs which he shall beget of his wife, or to a man, *et heredibus de carne sua*, or to a man, *et heredibus de se*. In all these cases these be good estates in tail, and yet these words, *de corpore*, are omitted;" Co. Lit. 20b. See also *Beresford's Case*, 7 Rep. 41a; *Cotton's Case*, 1 Leon. 211; *Jack d. Westby v. Fetherstone*, 2 Huds. & Bro. 320; *per Holt, C.J., Idle v. Cooke*, 2 Ld. Raym. at p. 1153; and Viner, "*Estate*," T. 5.

Settlement to use of E. for life, remainder to S. in tail male, remainder to F. in tail, remainder to E. in fee, with power to E. to revoke the uses limited to S., and to limit new uses. By deed E. revoked the uses limited "to S. and his heirs male," omitting "of his body," and limited new uses "to S. and his heirs male," omitting "of his body." *Held*, that S. took an estate tail, since, if it were construed a fee simple, it would destroy the remainder limited to F., which E. had not power to do; *Gilmore v. Harris*, Carth. 292; S. C. 3 Lev. 218.

If lands be granted to J. S., to have and to hold to him and the heirs he shall happen to have of his wife; by this gift he hath but an estate tail, and no fee simple; *Shep. Touch.* 104.

* One of the cases in which the words "of the body" are implied is of sufficient importance to be stated in the rule following :

(g) See as to the effect of a limitation to A. and his heirs, with a gift over if A. dies without issue, *post*, Chapter XVI., Rule 84; and as to the habendum explaining "heirs" to mean "heirs of the body," see *ante*, p. 218.

Limitation
over on
failure of
heirs of A. to
a person who
may be his
heir.

Rule 74.—If there be a limitation to A. and his heirs, with remainder over to B. on failure of the heirs of A., and B. is capable of being the heir of A., A. takes an estate in tail only, “heirs” being construed as “heirs of the body.”

This rule applies to wills; Hawkins, 177.

Examples.—A conveyance by way of marriage settlement was made to trustees “in trust for the use of the settlor for life, then to the use of his wife for life, and then in trust for the use of his first son and the heirs of such first son, and from and immediately after the determination of that estate, in trust for the use of his second, third, fourth, fifth, and all and every other son and sons, and their several and respective heirs, and for default of such issue, then to the use of all and every of his daughter and daughters, and their heirs, to take as tenants in common, and not as joint tenants, and for want of such issue, then in trust for the use of the right heirs of the survivor of himself and his wife for ever.” It was held that the sons took successively estates in tail, but that the daughters took estates in fee simple; Abbott, C. J. and Holroyd, J., gave no reasons for holding that the sons took in tail; but Bayley, J., adopting the argument of counsel, says, “In the first limitation in this deed, the word ‘heirs’ is necessarily used in the restricted meaning, on account of the subsequent limitation to the second son. For the deed speaks of the determination of the estate of the eldest son, which could not happen if by the word ‘heirs’ was meant ‘heirs general,’ for there could be no failure of heirs general to the eldest son whilst the second son remained alive. The same observations will apply to the limitation over to the second, third, and other sons;” *Doe d. Littledale v. Smeddle*, 2 B. & Al. 126.

The limitations in a post-nuptial settlement were to A., the husband, for life, remainder to trustees to preserve, remainder “to B. his eldest son, and the heirs of the said B., and for default thereof,” remainders to the other sons of A., successively in tail male; *Held*, tail in B. (Lord

Plunket in his judgment approves of *Doe v. Smeddle*); *Wall v. Wright*, 1 Dr. & Wal. 1. See also *Jack d. Westby v. Fetherstone*, 2 Huds. & Bro. 320.

The importance of pointing out from what person the heirs are to proceed (see 1 P. Wms. 72, *per* Powis, J.) will appear when we consider the following limitations to a husband and wife; they do not much differ in form, but it will be found in every case that the estate tail vests in that person from whose body the heirs are to proceed.

Designation of person of whose body the heirs are to be.

The distinction between heirs *of* the body, and heirs *on* the body, must be attended to: where "heirs *of* the body of the husband begotten by him *on* the body of the wife" are spoken of, the heirs intended are the heirs of the body of the husband, but they are restricted by the words "on the body of the wife" to a particular class of the heirs of the body of the husband, namely, those that he has by her. "Heirs begotten by the husband *of* the body of the wife," means "heirs of the body of the wife," but they are restricted to the heirs begotten by the husband. On the other hand, "heirs begotten by the husband *on* the body of the wife," means the heirs of their two bodies, because the word "heirs" is not applied to the one more than the other.

Gift to A. and his wife and the heirs of the body of A.; in this case A. has an estate in tail general, and the wife an estate for life; Litt. s. 26.

Gift to A. and his wife and the heirs of A., which he shall beget on the body of his wife; here A. has an estate in special tail, and the wife an estate for life; Litt. s. 27.

Gift to A. and his wife and the heirs of the body of the wife by A. begotten; here the wife has an estate in special tail, and A. an estate for life only; Litt. s. 28: *Denn d. Trickett v. Gillot*, 2 T. R. 431; *Reps v. Bonham*, Yelv. 181. And the rule is the same if the husband and wife take successive estates for life, with remainder to the

use of the heirs of the body of the wife by him to be begotten; *Alpass v. Watkins*, 8 T. R. 516.

Gift to the husband and wife and the heirs "which the husband shall beget on the body of the wife," or, "of the body of the husband and wife;" here they both take an estate tail; Litt. s. 28; *Denn v. Gillot*, 2 T. R. 431; *Williams v. Williams*, 12 East, 209.*

Begotten

Occasionally the words used are "heirs of his body begotten."

Here "begotten" extends to issue afterwards begotten (*h*), and "to be begotten," to issue already begotten; Co. Lit. 20*b*. So does "hereafter to be begotten;" *Hebblethwaite v. Cartwright*, Forester, 31; Ca. t. Talbot. See *per* Wood, V.-C., *Gabb v. Prendergast*, 1 K. & J. at p. 442. But where A. made a feoffment to the use of his younger son in tail, with remainder to the use of the heirs of A.'s body "*in posterum procreandis*," it was held that a special tail was created excluding issue already born. *Anon.*, 3 Leon. 87. And it is pointed out, 1 M. & S. 136, that the feoffor's passing by the eldest son in the first instance was a very important circumstance to indicate an intention to exclude him altogether.

Words of
reference.

An estate tail may be created by words of reference.

If a man gives lands to A. "*Et heredibus de corpore suo*," the remainder to B. (Co. Lit. 20*b*), or "to B. and his heirs" (Shep. Touch. 104); "*in forma prædicta*," this is a good estate tail. See also *Gilmore v. Harris*, 3 Lev. 213; S. C. Carth. 292; *Goodright d. Burton v. Rigby*, 2 H. Bl. 46.

"Male"
supplied by
context.

A limitation in tail general may be cut down to one in tail male, the word "male" being supplied by the context.

Example.—Settlement on C. for life, remainder to his heirs on the body of his wife to be begotten "the male to be preferred before the female and the elder brother before the younger : " *held*, that C. took an estate in tail male ; *Denn d. Creswick v. Hobson*, 2 Bl. Rep. 695, S. C. 5 Burr. 2609.

Rule 75.—A limitation to "the heirs of the body of A.," a dead person, vests an estate tail, descendible as if A. had been the first taker, in the person who is the heir of the body of A. at the date of the deed, as purchaser.

"Heirs of body" of deceased person (i).

Rule 76.—A limitation in remainder under the Statute of Uses to "the use of the heirs of the body of A.," a living person, whether the grantor or not, or at Common Law "to the heirs of the body of A.," a living person who is not the grantor, where A. takes no prior estate of freehold under the same deed, is a contingent remainder in tail in the person who at A.'s death is the heir of his body, descendible as if A. had been the first taker.

"Heirs of body" of living person (i).

Examples of Rules 75 and 76.—A limitation to "A. and the heirs of the body of his father," where the father is dead, and A. is his eldest son, gives A. an estate tail. If the father is alive, it is an estate for life in A., with a contingent remainder to the heir of the body of the father. See *Co. Lit. 26b* ; *Shep. Touch. 104*. Consider the distinction between the above limitation and one "to A. and his heirs of the body of his father ;" *ante*, p. 231.

Limitation to A. and the heirs of the body of B.

In *Manderill's Case*, *Co. Lit. 26b*, John de Mandeville by his wife Roberge had issue Robert and Maude, and died.

(i) As to whether the heir takes by descent or purchase, see *Fearne, C. R. 80, et seq.* As to a limitation at common law to the heirs of the body of the grantor, see *Co. Lit. 22h* ; *Fearne, C. R. 51*, cited *post*, p. 288 ; 1 *Sand. Uses*, 136. See as to deeds after 1833, 3 & 4 *Will. IV* c. 106, s. 4.

Michael de Morevill gave land to Roberge and to the heirs of John Mandeville, her late husband, on her body begotten. It was held that Roberge took an estate for life only, that the limitation to the heirs of the body of John de Mandeville operated as words of purchase, that the fee tail vested in Robert by purchase, and that on his death without issue it vested in Maude by descent. See *Fearne*, C. R. 82, note.

Limitation by marriage settlement to use of A. (the settlor) and his heirs till the marriage, afterwards to the use of the wife for life, remainder to the use of trustees and their heirs during the life of A., remainder to the use of the sons of the marriage successively in tail, remainder to the use of the heirs of the body of A., remainder to A. in fee. *Held* that the limitation to the heirs of the body of A. was a contingent remainder to the heir of his body; *Tippin v. Cosin*, or *Cosins*, or *Cozens*, Carth. 272; S. C., Holt, 731; 1 Ld. Raymd. 33; 4 Mod. 380; *Fearne*, C. R. 43. See to the same effect, *Else v. Osborn*, 1 P. Wms. 387.

In *Vernon v. Wright*, 7 H. L. C. 35, the rule was applied to a devise to "the right heirs of my grandfather S., deceased, by M., his second wife for ever." It was held that the words "heirs by his second wife," must be construed as "heirs of the body of S. lawfully begotten on the body of M., his second wife," and that the words "for ever," did not enlarge the estate into a fee simple.

Resulting
freehold to
grantor.

The rule does not apply where A. is the grantor and the uses limited during his life are not commensurate with his life, so that there is a resulting use of the freehold to him during his life (see *post*, Rule 112), with which the remainder to the heirs of his body coalesces under the rule in *Shelley's Case*.

A. settled lands to the use of J. for life, remainder to the use of J.'s wife for life, and, after intermediate remainders that failed, to the use of the heirs male of the

body of A. J.'s wife survived A. *Held*, that, on her death, the person who was then the heir male of the body of A., took an estate in tail male by descent from him; *Wills v. Palmer*, 5 Burr. 2615; S. C. 2 Bl. Rep. 687 (*k*). See this case discussed, *Fearne*, C. R. 45*a*; see also *Southcot v. Stowell*, 1 Mod. 226, 237; S. C. 2 Mod. 207; *Pibus v. Mitford*, 1 Vent. 372.

Rule 77.—Where A. and B. are husband and wife, a limitation to A. for life, with remainder to the heirs of the bodies of A. and B., creates not an estate tail in A., but a contingent remainder in tail in the heirs of the bodies of both A. and B.

Limitation to A., remainder to heirs of the bodies of A. and B.

See *Dyer*, 99*b*, pl. (64); *Gossage v. Tayler*, Sty. 325, cited by Buller, J., from a MS. report, 2 T. R. 435; *Frogmorton d. Robinson v. Wharrey*, or *Throgmorton d. Robinson v. Whalley*, 2 Bl. Rep. 728; S. C. 3 Wils. 125, 144: see also *Lane v. Pannell*, 1 Roll. Rep. 238, 317, 498. The case in 3 Leon. 4, pl. 10, must be considered as overruled. See *Fearne*, C. R. 38.

Rule 78.—The construction of a limitation to "A. and B., and the heirs of their bodies," depends upon whether (1) A. and B. are persons unable to marry, or (2) are husband and wife, or persons able to marry.

To A. and B. and heirs of their bodies.

(1.) If A. and B. are persons unable to marry (either two men or two women, or a man and woman within the prohibited degrees), they are joint tenants for life, with

Where A. and B. unable to marry.

(*k*) There is great difficulty in understanding the part of the certificate which says "that if a third person had been the grantor, Henry would have taken an estate in tail male by purchase." William was at Archdale's death the heir male of his body, so that he would have taken an estate in tail male by purchase, and Henry would have taken by descent from him according to the doctrine in *Mandeville's Case*, *supra*. Possibly all that was meant was that Henry would not have taken by descent from Archdale. See *Fearne*, C. R. 82.

several inheritances; Co. Litt. 182*a*, 184*a*: Fearn, C. R. 36.

Where A. and B. husband and wife, or can marry.

(2.) If A. and B. are husband and wife, or a man and woman who can marry, they take an estate in special tail in the entirety; Co. Litt. 25*b*; Fearn, C. R. 35. See *post*, Chap. XIX., JOINT TENANCY. Williams, R. P. Chap. VI.

In marriage settlement "heirs" extended to all the children by parenthesis, punctuation, &c.

Rule 79.—In construing the limitations in a marriage settlement, the words "heirs," or "heirs of the body," may, by the use of a parenthesis, or by punctuation, be construed as applying to all the children, or to all the sons, as the case may require.

Examples.—Where the limitations in a marriage settlement were (after prior limitations) "to the use of all and every the child or children equally share and share alike to hold the same as tenants in common and not as joint tenants, and if but one child, then to such only child, his or her heirs or assigns for ever," it was held that the words "to hold the . . . then to such only child" might be put into a parenthesis so as to make the limitation run "to the use of all and every the child and children equally share and share alike, his or her heirs or assigns," and thus to give estates in fee simple to the children; *Doe d. Willis v. Martin*, 4 T. R. 39.

Limitations to the use of N. for life, remainder to trustees to preserve, &c., remainder (subject to a term) to the use of the first son of the body of N., lawfully issuing, and for default of such issue, to the use of the second, third, fourth, &c., and of all and every son and sons of N. lawfully issuing severally and successively in remainder one after another, as they and every of them shall happen to be in priority of birth and seniority of age, and of the several heirs male of the body and bodies of all and every such son and sons respectively issuing; *held*, that the only son of N. took an estate in tail male; *Owen v. Smyth*, 2 H. Bl. 594.

Marriage settlement to the use of J. for life, remainder to trustees to preserve, &c. remainder (subject to terms for portions, &c.) to the use of the first son of the body of J. by A. his intended wife, and for default of such issue, to the use of the second, third, and other sons of the body of J. by A., severally and successively as they should be in seniority of age, and of the several heirs male of their respective bodies, and for default of such issue, then, in case A. should be *enceinte* by J., to the use of P. till A. should be delivered, in trust for afterborn child or children; and in case such should be a son or sons, to the use of such afterborn son and sons severally and successively as they should be in priority of birth, and the heirs male of the body and bodies of such afterborn son and sons. *Held*, that the first son of J. by A., born during his life, took an estate tail; *Galley v. Barrington*, 2 Bing. 387; S. C. 10 J. B. Moore, 21.

A limitation "to the use of M. and such other daughter or daughters as F. shall or may have or beget on the body of K., his wife, if any, share and share alike, and if no other daughter save the said M., then the said premises to go and descend to the said M., her heirs and assigns for ever." It was observed by Sugden, C., that "in construing such limitations, by punctuation, or by the use of a parenthesis, the words "heirs and assigns," may be extended in their application, and instead of being confined to one daughter may be referred to all the daughters of the marriage, if more than one;" *Rockfort v. Fitzmaurice*, 2 Dr. & War. 1, at p. 15. See also *Re Denny's Estate*, Ir. R. 8 Eq. 427.

Rule 80.—Words which create an estate tail in freeholds, create an estate in fee simple conditional in copyholds holden of a manor where there is no custom to entail.

See *Doe d. Simpson v. Simpson*, 4 Bing. N. C. 333; S. C. 3 Man. & Gr. 929; *Doe d. Spencer v. Clarke*, 5 B. &

Al. 458; *Pullen v. Middleton*, 9 Mod. 483; *Rowden v. Maltster*, Cro. Car. 42.

The Rule in Shelley's Case (e).

Rule 81.—Where the ancestor takes an estate of freehold, and in the same instrument an estate is limited by way of remainder, either mediately or immediately, to his “heirs” or “heirs of the body,” the word “heirs” is a word of limitation and not of purchase, and therefore the ancestor takes an estate in fee simple or in tail, as the case may be.

“Where the ancestor taketh an estate of freehold, and after a remainder is limited to his right heirs, the fee simple vesteth in himself, as well as if it had been limited to him and his heirs; for ‘his right heirs’ are in this case words of limitation of estate, and not of purchase. Otherwise it is where the ancestor taketh but an estate for years: as if a lease for years be made to A. the remainder to B. in tail, the remainder to the right heirs of A.; there the remainder vesteth not in A., but the right heirs shall take by purchase if A. dieth during the estate tail. . . . And so it is if A. make a feoffment in fee to the use of B. for life, and after to the use of C. for life or in tail, and after to the use of the right heirs of B. B. hath the fee simple in him as well when it is by limitation of use, as when it is by act executed;” Co. Lit. 319b.

Estate of
ancestor
determinable.

It makes no difference that the estate of the ancestor may determine during his own lifetime, as in *Merrill v. Rumsey*, 1 Keb. 888; S. C. 1 Sid. 247, pl. 12; T. Raym. 126; where a conveyance was made to husband and wife for their joint lives, and after the decease of either, to her heirs by him.

(a) See *Shelley's Case*, 1 Rep. 93b; Fearn, C. R. 28, et seq.; Tudor's E. C. Real Property (3rd ed.), 589.

begotten; it was held to be tail in the wife: or, as in *Curtis v. Price*, 12 Ves. 89, where the estate limited to the ancestor was during widowhood only.

Even under the old law, contingent remainders interposed between the limitation to the ancestor and that his heirs were not destroyed. The estate of inheritance in the ancestor was considered to be executed *sub modo* only, and so as to open and let in the contingent estates if they vested in the lifetime of the ancestor; *Lewis Bowles's Case*, 11 Rep. 79b; Tud. L. C. Real P. 37 (3rd ed.).

Contingent remainders interposed.

It makes no difference that the ancestor takes his estate of freehold by implication only; *Pibus v. Mitford*, 1 Vent. 372; *Wills v. Palmer*, 5 Bur. 2615; S. C. 2 Bl. Rep. 687.

Ancestor taking estate by implication (f).

The Rule applies to limitations of copyholds; *Allen and Palmer's Case*, 1 Leon. 101. See Fearn, C. R. 66.

Copyholds.

The two limitations must be in the same instrument.

Both limitations must be in same instrument.

See *per Dyer*, C. J. in *Cranmer's Case*, 2 Leon. 7; and *Moor v. Parker*, 4 Mod. 816, S. C. 1 Ld. Ray. 87; *Snowe v. Cuttler*, 1 Lev. 185; *Doe d. Fonnereau v. Fonnereau*, 2 Doug. 487.

The question whether a deed in execution of a power is to be considered as part of the instrument conferring the power, so as to make limitations in the two instruments coalesce according to the rule, has been much discussed: see Fearn, C. R. 74; Co. Lit. 299b. n. (I); 1 Prest. Est. 324; 2 Jarman on Wills, 384. In Sugden on Powers (8th ed. p. 472), Ed. St. Leonards says: "In *Venables v. Morris*, 7 T. R. 342, the very question arose. Under a settlement, the husband was tenant for life, remainder to trustees and their heirs generally to preserve

Deeds exercising powers.

(f) See further as to estates by implication, *post*, Chapter XX.

remainders, with remainder (after several uses which never arose) to such uses as the wife should appoint. She appointed to the right heirs of her husband. The Court ultimately held that the fee simple vested in the trustees, so that the estate limited under the power being merely equitable, could not unite with the limitation to the husband for life in the deed, which was a legal estate; but *Ld. Kenyon* treated it as quite a clear point, that the appointment was to be considered in the same light as if it had been inserted in the original deed by which the power of appointment was created; and therefore he held that, if the limitation to the heirs of the husband had been a legal estate, it would have enlarged the estate in the ancestor, and given him a fee. The point may be considered as settled."

One limitation
legal and one
equitable.

The Rule does not apply where one limitation is legal and the other is equitable; *Venables v. Morris*, 7 T. R. 342; *Tippin v. Coson*, or *Cosin*, 4 Mod. 380; S. C. Carth. 272; *Ireson v. Pearman*, 3 B. & C. 799.

Words added
to limitation
to ancestor.

The Rule applies even if words are added to the limitation to the ancestor, clearly showing that his estate is not intended to continue after his death; see the cases (all on wills) collected, *Theobald on Wills* (2nd ed.) p. 336.

Limitation to
heirs followed
by words of
distribution;

It applies if words of distribution are added to the limitation to the heirs, as "share and share alike;" see the cases (all on wills) in *Theobald on Wills* (2nd ed.) p. 338.

or by words of
limitation;

Words of limitation added to the limitation to the heirs do not prevent the application of the rule; see this discussed, *Hawkins on Wills*, 185; see the cases on wills collected, *Theobald on Wills* (2nd ed.) p. 337. *Tud. L. C. R. P.* 608.

Where in a marriage settlement the limitations were to the husband for life, remainder to the wife for life, remainder to the "heirs of the body of the wife and their

heirs and assigns for ever," it was held that the wife took an estate tail; *Alpass v. Watkins*, 8 T. R. 516.

The rule applies if words both of distribution and of limitation are added to the limitation to the heirs; see *Theobald on Wills* (2nd ed.) p. 338. See the question discussed what words of explanation added to the word "heirs" will render the heirs purchasers; *Hawkins on Wills*, 186: *Theobald on Wills* (2nd ed.), p. 340.

In *Re White and Hindle's Contract*, 7 Ch. D. 201, *Malins, V.-C.*, held that there is no difference between deeds and wills as to the application of the rule in *Shelley's Case*.

It is said that the rule does not apply where the limitation to the heirs is not by way of remainder, but is by way of executory or conditional limitation of a future use: but see *Re White and Hindle's Contract*, *ubi sup.*

The rule applies though the remainder be contingent; *Co. Lit.* 378b; 1 *Prest. Est.* 316.

Conditional and determinable fees, &c.

The many questions that occur on conditional fees will be found discussed in *Co. Litt.* 201a to 237, "Estates upon condition." As to the meaning of "condition," see 2 *Fearne*, C. R. 3.

The cases on the construction of fees made determinable by shifting clauses taking effect under the Statute of Uses, are discussed in *Co. Litt.* 327a, note; 3 *Dav. Prec.* 349, *et seq.*

The question whether a fee can be made determinable at common law is discussed in *Sanders on Uses*, 208, in *Pollock on the Land Laws*, 213, and in the treatise by *Mr. Challis*, prefixed to *Hood and Challis on the Conveyancing Acts*, 2nd edit. p. 48, *et seq.* See also *Tud. L. C. R. P.* (3rd edit.), 744.

It should perhaps be observed that a limitation at common law, "to A. and his heirs for a term of years," confers a chattel interest only, which passes to his executors or administrators on his death: *Co. Litt.* 388a, 62b;

Shep. Touch. 271, 469; 1 Prest. Est. 81 *et seq.* See also *Anon.*, Godb. 42, pl. 48.

Estate *pur autre vie*.

The effect of a limitation to A. *and his heirs* during the life of B., is not that A. takes a determinable fee simple, but that if A. dies without having disposed of his estate *pur autre vie*, his heir takes it as special occupant and not by descent; *Atkinson v. Baker*, 4 T. R. 229; *Doe v. Laurton*, 6 T. R. 292; See Tud. L. C. R. P. (3rd edit.), pp. 50, *et seq.*

As to a *quasi* estate tail *pur autre vie*, see Tud. L. C. R. P. 53, 54; and Williams on Seisin, 166.

In connection with the subject of determinable fees the following remarks may be made:—

Estate gained by entry under power.

First, where a rent-charge, with power of entry, is secured to A. and his heirs, A. gains by entry no estate of freehold, but merely an interest by the agreement of the parties to take the profits in the nature of a distress; Co. Litt. 203a. And this interest passes to the executors of the person who enters: see note, *loc. cit.* and the cases there cited; see also *Jemmot v. Cooly*, 1 Lev. 170; S. C. T. Ray. 135, 158.

Lease till a certain sum be paid.

Secondly, if a lease be made of land to A., without words of limitation, till a certain sum be paid, “in this case, because the annual profits are uncertain, he hath an estate for life, if livery be made, determinable upon the levying of” the sum; Co Litt. 42a. But, formerly, it was but an estate at will without feoffment, for it is not certain that the land shall be every year of the same annual value. See the *Bishop of Bath's Case*, 6 Rep. at p. 36a. On the other hand—

Grant of rent till certain sum be paid.

Thirdly, “If a man grant a rent of £20 per annum till £100 be paid, there he hath an estate for five years, for there it is certain and depends upon no uncertainty;” Co. Litt. 42a.

CHAPTER XVI.

DEATH WITHOUT ISSUE.

Death without issue: Gift over on death before the happening of a certain event, "or" without issue: Limitation to A. and his heirs, or to A. for life, followed by a gift over on death "without issue," or, "without heirs of his body": Gift over "in default of such issue," or "without leaving issue": Limitation to children with gift over in default of such issue.

Rule 82.—The words "die without issue," are "Death without issue." construed to mean the death of the propositus, and the failure of his issue at any time either before, at, or after his death.

The rule applies where the words are "without issue male."

Examples.—Limitation of a term to raise portions, "if A. should die without issue male;" A. died leaving a son and daughters, then the son died without issue male: *Held* that the limitation on "the death of A., without issue male" thereupon took effect; *Goodwin v. Clark*, 1 Lev. 35: S.C. *sub nom.* *Goodiar v. Clarke*, 1 Sid. 102, where the words are said to be "if he die without heir male of his body;" S. C. *sub nom.* *Goodier v. Clerke*, 1 Keb. 73, 78, 169, 246, 462, where the case is stated somewhat differently.

The rule does not apply where the gift over is on death without issue at a certain age; *Right v. Day*, 16 East, 67, a will case.

The context may show that death "without issue" means "without leaving children," see *post*, Chap. XXIII., or "without-leaving issue living at A.'s death." See the cases (all arising on Wills); Hawkins, 207; 2 Jarman on Wills, 497.

"Or" without issue read "and."

Rule 83.—In a limitation to A. in fee simple, or to A. for life with remainder to his issue, with a gift over on his death before the happening of a certain event, *or* without issue, "*or*" will be construed "*and*."

Surrender of copyholds to the use of S. for life, remainder to the use of his wife E. during widowhood, remainder to the use of W. for life, remainder to the use of the issue of his body; with a proviso that if W. should die in the lifetime of S. *or* without issue of his body, then the surrendered premises should go over: *Held*, that "*or*" must be read "*and*," and that the gift over would only take effect if W. died in the lifetime of S. without issue; *Wright v. Kemp*, 3 T. R. 470.

See the corresponding rule as to wills stated and discussed, 1 Jarman on Wills, 505; Hawkins, 203.

Limitation to A. and his heirs with a gift over on his death without issue.

Rule 84.—A limitation "to A. and his heirs," followed by a gift over if A. dies "without issue," or "without heirs of his body," confers an estate tail on A. (See *per Wright*, L. K., 1 P. W. 57, note.)

Examples.—"If lands be given to B. and his heirs, to have and to hold to B. and his heirs, if B. has heirs of his body, and if he die without heirs of his body, that it shall revert to the donor, this is adjudged an estate tail and the reversion in the donor;" Co. Lit. 21a.

Limitation to the use of A. and B., his wife for life and to the heirs of A. after the death of A. and B., and if it

shall happen that A. should die without issue of his body, remainder over; *held*, tail in A.; *Canon's Case*, 8 Leon. 5, pl. 18.

Feoffment by B., to the use of himself for life, remainder to the use of J. for life, remainder to the use of the first son begotten of the body of J. that shall have heirs male of his body and to his heirs, and in default of such issue of his body, to the use of the first daughter of J., which shall have issue of her body, remainder to the right heirs of J. *Held*, that the limitation to the first son of J., was a contingent estate tail in him; *Beck's Case*, alias *Burton v. Nichols*, Lit. Rep. 159, 253, 285, 315, 344. The report of this case *sub nom. Boreton v. Nicholls*, Cro. Car. 363, is very imperfect.

Limitation to the use of A. for life, remainder "to the use of his son Thomas and his heirs for ever, and for default of issue of the body of the son," to the use of the heirs of A.; *held*, tail in the son; *Leigh v. Brace*, 5 Mod. 266; S. C. Carth. 343; 1 Lord Ray. 101; 3 Salk. 337; Holt, 668; 12 Mod. 101. There is some discrepancy in the reports of this case, but it is correctly stated in the text. See Willes, 181.

Conveyance to the use of the settlor for life, remainder to the use of D., his heirs and assigns, but if D. should die without issue, to the use of T., his heirs and assigns, but if both D. and T. should die without issue, to the use of the male issue of the settlor. D. died without issue; *held*, that T. took an estate tail; *Morgan v. Morgan*, L. R. 10 Eq. 99.

Limitation to the use of A. for life, remainder to the use of his eldest son and the heirs male of such eldest son, the elder always to be preferred before the younger, and in case of failure of the issue male of the eldest son, remainder over. *Semble*, the eldest son took an estate tail: *Smith v. Smith*, 5 Ir. C. R. 88.

It is perhaps unnecessary to say that an express estate for life will not be enlarged by a gift over in default of issue of the tenant for life; *Seagood v. Hone*, Cro. Car. 366.

Estate for life
not enlarged
by gift over on
death with-
out issue.

Limitation
over in de-
fault of *such*
issue, or with-
out *leaving*
issue.

Rule 85.—An estate in fee simple is not cut down to an estate tail by a gift over “in default of *such* issue,” or, “without *leaving* issue.”

“For default of such issue;” *Idle v. Cook*, 2 Ld. Ray. 1144; S. C. 2 Salk. 620; 1 P. W. 70; 11 Mod. 57; Holt, 164.

“Without leaving issue:” *Olivant v. Wright*, 9 Ch. D. 646.

“For want of such;” *Bayley v. Morris*, 4 Ves. 788.

Personalty.

As to the effect of such words in a gift of personalty, see *Exel v. Wallace*, 2 Ves. Sen. 118; on app. *ibid.*, 318.

“Such issue”
proceeding
from specified
body.

Of course the context may show that the issue is to proceed from a specified body, so as to cut down the fee to an estate tail.

Limitation to the use of the first son who shall have issue male of his body and to his heirs, and for default of such issue over; *held*, tail in the son; *Burton v. Nichols*, alias *Beck's Case*, Lit. 159, 253, 285, 315, 344; S. C. *sub nom.* *Boreton v. Nicholls*, Cro. Car. 363.

In *Beresford's Case*, 7 Rep. 41a, a limitation in remainder “to the use of A. and of the heirs male of the said A. lawfully begotten, and for default of such issue,” over, was held, on the construction of the whole deed, to give to A. an estate in tail male. Willes, C. J., says (*Goodright d. Goodridge v. Goodridge*, Willes, 874), that this case “can hardly be cited as an authority, unless a deed of uses should happen to be penned exactly in the same words.”

In *Shelley v. Earsfield*, 1 Rep. in Ch. 206, where the limitations were, to the use of A. for life, remainder to the use of the heirs of A. lawfully begotten, and for want of such issue remainder (subject to some prior limitations) to the use of B. (A.'s brother) for ninety-nine years if he should so long live; it was held that A. took

in tail. No reasons were given for the decision, which probably turned on Rule 74, *ante*.

Rule 86.—A limitation to a child, or to children generally, will not be enlarged to an estate tail merely by a gift over “in default of such issue.”

Gift to children not enlarged by gift over in default of such issue.

Examples.—Remainder in a settlement, after successive estates tail in the sons, “to the use of all and every the daughters of the body of the said A. on his said wife to be begotten as tenants in common and not as joint tenants, and for default of such issue, to the right heirs of A. It was admitted without argument that the daughters took for life only; *Snell v. Silcock*, 5 Ves. 469; *Chambers v. Taylor*, 2 My. & Cr. 376.

CHAPTER XVII.

HEIRS AS PURCHASERS (a).

“Heir” or “Heir of the body” in the singular: Heir at common law takes under limitation to “heirs” as purchasers: “Heirs” and “Heirs of the body” with superadded qualification: “Heirs of the body” may mean children: “Heirs” or “Heirs of the body” applied to personality.

As is pointed out, *ante*, pp. 225, 232, a limitation to “A., and his heir,” or “the heir of his body,” in the singular, does not vest an estate in fee or tail in A., it follows:—

Limitation to A. for life; remainder to “heir” or “heir of his body.”

Rule 87.—Under a limitation to A. for life, with remainder to his “heir” or to the “heir of his body,” A. takes for life only, with a contingent remainder for life to his heir, or to the heir of his body; *Chambers v. Taylor*, 2 My. & Cr. 376.

Remainder to heir of his body and the heirs or heirs of the body of such heir.

Rule 88.—Under a limitation to A. for life, with remainder to the heir of his body, and the heirs, or heirs of the body, of such heir, A. takes for life only, with a contingent remainder in fee or tail to the heir of his body; *Archer’s Case*, 1 Rep. 66b.

(a) See *post*, Chapter on MARRIAGE ARTICLES. See p. 228 for limitations to the heirs of a deceased person, or, in remainder, to the heirs of the grantor; p. 229, for a limitation in remainder to the heirs of a living stranger; p. 237, for a limitation to the heirs of the body of a deceased person, or of a living person who takes no prior estate of freehold.

Examples.—Limitation to A. for life, remainder to his first son and the heirs male of his body, and so to his six sons, remainder to the heir male of A. to be begotten after the sixth son and of his heirs male; *held*, that the last remainder was only a contingent estate in the son, and not tail in A.; *Waker v. Snowe*, Palm, 859.

In a marriage settlement, after life estates to the husband and wife, there were remainders to the heir male of her body by him to be begotten and his heirs male, and for want of such, to the daughters, and if there should be no issue of the marriage, to the right heirs of the husband; the first remainder was held to be a contingent remainder in fee to such person as should be heir male of the body of the wife at her death; *Bayley v. Morris*, 4 Ves. 788.

But "heir" in the singular may be explained to mean "heirs" in the plural, so as to be a word of limitation instead of purchase.

"Heir" in the singular construed "heirs."

Feoffment to the use of A. for life, remainder to the use of B. for life, remainder to the use of the heir or heirs of the body of A., and to the use of such heir or heirs, and if he dies without issue remainder over; *held*, that the heir took by descent, for though "heir" is a word of purchase, yet "heirs" explains it, and makes him in by descent of an estate tail; *Bony v. Taylor*, 16 Viner, 218, *Parols*, H. pl. 3; S. C. 2 Roll. 253.

Rule 89.—The heir at common law will take under a limitation to the "heirs" or "heir" as purchasers.

"Heirs" as purchasers means the heir-at-law

Examples.—"If a lease for life [of lands of the nature of gavelkind] be made, the remainder to the right heirs of B., and B. dieth, his eldest son only shall inherit, for he only to take by purchase is right heir by the common law. So note a diversity between a purchase and a descent;" Co. Lit. 10a. Mr. Hargrave in his note on

this passage says : " The reason seems to be that though the subject of the gift is *customary* land, the heir at *common law* is presumed to be meant, unless words are added to describe the *customary* heir. But if such special words are used, the presumption fails; and then it is said that though the subject of the gift is common law land, yet the customary heir shall be preferred." The following are cases on wills : *Thorp v. Owen*, 2 Sm. & Gif. 90; *Roberts v. Dixwell*, 1 Atk. 607; *Sladen v. Sladen*, 2 J. & H. 369; *Garland v. Beverley*, 9 Ch. D. 213 (where the land was gavelkind); *Haslewood v. Green*, 28 Beav. 1 (where there was a mixed gift of realty and personalty); *Polley v. Polley*, 31 Beav. 363 (where the land was Borough English).

"Heirs" as purchasers, with qualification (b).

Rule 90.—Under a limitation to the "heirs" of any person, with a superadded qualification, as purchasers, the heir taking by purchase must possess that qualification.

See this discussed in *Cholmondeley v. Clinton*, 2 Mer. 172 (at p. 344); 2 B. & Ald. 625; 2 Jac. & W. 1 (at pp. 77 and 106, *et seq.*); 4 Bli. 1; Sugden, Law of Property, 114; *Wrightson v. Macaulay*, 14 M. & W. 214; *Thorpe v. Thorpe*, 1 H. & C. 326; *Counden v. Clarke*, Hob. 29; S. C. Moore, 860; *Doe d. Winter v. Perratt*, 10 Bing. 198 (all cases on wills). See also Mr. Hargrave's note (8), Co. Lit. 24b; 2 Jarman on Wills, 65, *et seq.*

"Heirs male of the body" as purchasers.

Observation.—This rule is subject to an important exception stated in the rule following. Considerable discussion has taken place on the question whether a person, taking by purchase under the description of heir male or heir female of the body, must be heir general of the body (c). Coke says (Co. Lit. 24b): "If A. hath issue a son and a daughter, and a lease for life be made,

(b) As to heirs taking by descent with a qualification, see *ante*, p. 230.

(c) See Hawkins on Wills, 169; 3 Dav. Prec. 345 (note).

the remainder to the heirs females of the body of A.; A. dieth, the heir female can take nothing because she is not heir." In other words, in Coke's opinion, it was necessary that the heir male (or female) should be a male (or female) being also heir general. The modern doctrine is that by heir male (or female) of the body is meant the person who would have been heir in tail if an estate in tail male (or in tail female) had been given to the ancestor.

The distinction may be exemplified as follows: Let the gift be to the heir female of the body of A. who has a son and a daughter, both of whom die in his lifetime, the daughter having a son and the son having a daughter; then, according to Coke's doctrine, the daughter of the son would be the heir female, because she would be heir general and also a female; while according to the modern doctrine, there would be no heir female. As another example, let the daughter leave a daughter and the son leave a son; then, according to Coke, there would be no heir female, for the son's son is heir general, but is not a female. But according to the modern doctrine, the daughter's daughter would be heir female, because she would be heir if only females could inherit; or, to use other words, she would have been heir in tail if an estate in tail female had been given to the ancestor.

Rule 91.—Under a limitation to the heirs male ^{"Heirs male of the body"} (or female) of the body of any person, the heir male ^{as purchasers.} (or female) of the body taking by purchase need not be heir general.

Where in a settlement there was a limitation in remainder "to the use of the heirs male of the body of A.," and A. died, leaving his granddaughter his heir-at-law, and two sons, W., the elder, and H., it was held that on W.'s death without issue, H. took as heir male of the body of A.; *Wills v. Palmer*, 5 Bur. 2615; S. C. 2 Bl. Rep. 687; *Fearne*, C. R. 45. See *ante*, p. 239, note.

Settlement of land to the use (subject to prior limitations) of the sons of the intended marriage successively in tail male, "and for want of such issue, to the use of the heirs female of the body" of the intended husband begotten on the body of the intended wife and her or their heirs, remainder to the right heirs of the husband: *held*, that a daughter of the marriage was to be preferred to the granddaughter of the son of the marriage who was the testator's heir-at-law; *Goodtitle d. Weston v. Burtenshaw*, Fearn, C. R. App. 570; see Mr. Hargrave's note, Co. Lit. 24b; 2 Jarman on Wills, 67.

Limitation to the heir (in the singular) female of the body of the settlor; there being one son, heir-at-law, and four daughters; *held*, that the daughters took; *Chambers v. Taylor*, 2 My. & Cr. 376.

"Heirs of the body," meaning children.

Rule 92.—The context may shew that the words "heirs of the body" mean "children," and then they will be words of purchase, notwithstanding that the parent takes a prior estate of freehold.

Examples.—Limitations to E. for life, remainder to the first son of E. in tail male, with like remainders to the second, third, and fourth sons in tail male, "and so severally and respectively to each of the heirs male of the body of E., and the heirs males of their bodies," remainder over; *held*, that E. took an estate for life only, with remainder to his sons successively in tail male; *Lisle v. Gray*, T. Raym. 278, 315; S. C., T. Jones, 114; 2 Lev. 223. It is stated by Lord Hardwicke (1 Ves. Sen. 147), and by Tracy, J. (1 P. Wms. 90), who had searched the record, that the statement that *Lisle v. Gray* had been reversed is erroneous.

By a marriage settlement lands were limited to the use of the wife and husband successively for life, with remainder to the use of the heirs of the body of the husband on the body of the wife and their heirs, and if more children than one, equally to be divided between them as

tenants in common, and for default of such issue, over; *held*, that the children took by purchase as tenants in common in fee; *North v. Martin*, 6 Sim. 266.

On marriage, the husband executed a deed poll whereby he settled all his real and personal estate "upon the said (intended wife) in case she survive me, and upon the heirs of her body by me lawfully to be begotten, obliging her to pay to each of her children by me begotten as aforesaid, so soon as he, she, or they attain the age of twenty-one years, the sum of £1000, and the remainder of all I die possessed of equally at her death to divide among her children by me begotten as aforesaid;" *held*, that the children took as tenants in common in fee; *Lowther v. The Earl of Westmoreland*, 1 Cox, 64. (But this seems to have been considered as a case of executory limitation, see p. 67.)

Trusts of freeholds and leaseholds declared for H. for life, and afterwards for the heirs of her body, and of J. and M. their heirs, &c.; *held*, that H. took for life only, and that the heirs of the body were purchasers; *Withers v. Algood*, cited *Bagshaw v. Spencer*, 1 Ves. Sen. 150.

The rule applies to trusts of personalty also. See *Symers v. Jobson*, 16 Sim. 267; *Bull v. Comberbach*, 25 Beav. 540; *Pattenden v. Hobson*, 17 Jur. 406; S. C., 22 L. J. Ch. 697 (all cases on wills).

"Heirs" applied to Personalty.

Rule 93.—A gift of personalty, either directly to, or by way of trust for, "A. and his heirs," is a gift to A. absolutely. Gift of personalty to "A. and his heirs."

Rule 94.—An independent gift of personalty, either directly to, or by way of trust for the "heirs" of A., is a gift to the heir-at-law of A. Independent gift of personalty to "heirs."

Rule 95.—A gift of personalty to the "heirs" Substitu-

tionary gift of
personalty to
"heirs."

of A. in substitution for A.; in the event of his death before the time of distribution, is a gift to such of the statutory next of kin as survive A.

The distinction between rules 94 and 95 is well explained by Romilly, M. R., in *Hamilton v. Mills*, 29 Beav. 193, where the trusts of money were declared by deed for A. for life, afterwards for B., his wife, for life, afterwards for the children of the marriage, "and on failure of any child or children of the marriage, then to the right heirs of the survivor of A. and B." Lord Romilly said: "Nothing turns on the word 'heirs' being in the plural instead of the singular number; they may be many as well as one. The question is, whether the words 'right heirs' are to be treated as words of description or words of substitution; it is something analogous to, but not the same as, the case of a devise of real estate, where the question is whether the word 'heirs' is a word of limitation or purchase. I cannot say it is a word of limitation; nor is it what may be called a word of substitution. If it creates a gift substituted on a failure of a prior gift, so that the real meaning of the words in the will amounts to this—that if the person who is the principal object of the legacy should die and not be able to receive it, it is given to his right heirs, it follows the devolution of personal estate. If a legacy be given to A. or his heirs, A., if he survives the testator, will be entitled to the legacy; but if A. die, the word 'heirs' is introduced to prevent a lapse, and therefore the Court holds that if the first legatee does not take, the same person will take as would have taken after him if there had been no lapse, and that the legacy follows the devolution of personal estate. But when the words are descriptive and not substitutional, you must follow the obvious meaning of the word. Thus, if a person says 'I give a legacy to the heir male of A.,' the heir takes the legacy, and A. takes nothing. It is the same as if the testator said 'I give the person who is A.'s heir £1000.' The only question is, to which of these two classes of

cases these words belong. In all cases of substitution, the primary legatee, if he had survived the testator, would have taken; but here there is no gift to the survivor, but the settlement expressly directs that on failure of children it is to go 'to the right heirs of the survivor.' There is no principle on which these words can be considered as a substitutional gift to the 'right heirs' of the survivors."

Examples of rules 94 and 95.—By a marriage settlement £500 was assigned to trustees, on trust, with the consent of the wife, to lay out the same in land of inheritance to be conveyed to the trustees, in trust, to pay the rents to her for life for her separate use, remainder to her husband for life, and after the death of the survivor, on trust to convey to such persons as the wife should appoint, and in default of appointment, in trust for the heirs of the wife: proviso, that, until the purchase, the trustees should invest in the Funds, and pay the dividends to the wife for her life for her separate use, and after her death, to the persons who would be entitled to the rents of the land if purchased, and should pay or transfer the principal sum of £500, or the stock purchased, to such person "as according to the limitations aforesaid might be entitled to the inheritance" of the land; *held*, that on the death of the wife without having appointed, the £500, which had not been invested in land, and therefore remained personal estate in equity, went to her heir-at-law; *Russell v. Smythies*, 1 Cox, 215.

A. and B. were co-heiresses of an estate; by post-nuptial settlement A.'s moiety was settled to the use of her husband C. for life, remainder to the use of A. for life, remainder to the use of B. for life, remainder to trustees for a term of years. The trusts of the term were to raise £1000 and to pay it (in default of exercise of a special power, which was not exercised), "to the next heir or co-heirs" of B. A. and her husband died in the lifetime of B. *Held*, that the heirs-at-law of B. were

entitled on B.'s death to have the £1000; *Morris v. Cantle*, 6 Br. P. C. 418.

I have been unable to find any case where, under the trusts of a deed, the "heirs" took by substitution. The cases on wills are collected in *Wingfield v. Wingfield*, 9 Ch. D. 658; see also *Keay v. Boulton*, 25 Ch. D. 212.

"Heirs of the body" applied to personality.

Trust for A.
and the "heirs
of his body."

Rule 96.—A trust of personal estate for A. and the heirs of his body, or for "A. for life," with remainder, either mediate or immediate, to the "heirs of his body," vests the property in A. absolutely.

This rule is sometimes put thus: "Expressions which, if applied to real estate, would confer an estate tail, shall when applied to personal property, simply give the absolute interest; Wms. Personal P., Pt. 4, Ch. 1, p. 315 (11th ed.). See *Leventhorpe v. Ashbie*, Roll. Abr. 831, pl. 1, S. C., Tud. L. C. Real P., 861 (3rd ed.).

Examples.—Term assigned by marriage settlement to trustees on trust to permit T., the intended husband, to enjoy the same so long as he should live, with remainder on trust for A. the intended wife for life, and after the decease of T. and A. to permit the heirs of the bodies of T. and A. to hold the premises during the remainder of the term; *held*, that the whole term vested in T.; *Webb v. Webb*, 2 Vern. 667; S. C., 11 P. Wms. 131.

See to the same effect, *Tatton v. Mollineux*, Moo. 809; *Thecbridge v. Kilburne*, 2 Ves. Sen. 233. Consider *Re Whitty*, Ir. R. 9 Eq. 41. See the cases on wills collected, Hawkins, 188; 2 Jarman on Wills, 562.

The rule has also been applied where the words were to permit and suffer A. to receive the rents, &c., for so

many years of the term as should expire in his lifetime, and after his decease in trust to permit B., A.'s wife, to receive the rents during her life, and after the several deceases of A. and B. to permit the heirs of the body of A. to receive the rents for so many years of the term as should expire in the life or lives of him, her, or them respectively; *Bartlett v. Green*, 13 Sim. 218; S. C., 12 L. J. (N. S.) Ch. 149.

The rule is not affected by a gift over on general failure of issue of the propositus; *Bartlett v. Green*, 13 Sim. 218; *Theebridge v. Kilburne*, 2 Ves. Sen. 233.

The rule does not apply where the word is "Heir" in singular. "heir" in the singular; *Le Rousseau v. Rede*, 2 Ed. 1.

First Exception.—Where there are words of limitation to the executors of the heirs of the body, the latter take by purchase; *Hodgson v. Bussy*, Barn. Ch. Rep. 195; S. C., 2 Atk. 89, cited as *Hodsel v. Bussy*, 2 Ves. Sen. 646.

Second Exception.—Where there is an executory trust for the heirs of the body; see Chapter on MARRIAGE ARTICLES, *post*.

Third Exception.—The context may shew that "heirs of the body" are words of purchase; *Withers v. Algood*, cited in *Bagshaw v. Spencer*, 1 Ves. Sen. 150, where the words were "to A. for life, and afterwards to the heirs of his body, and of J. and M., their heirs, &c."

Fourth Exception.—Apparently where the trusts are contained in a marriage settlement, and the property is the husband's, and the heirs are to proceed

Gift over on failure of issue.

"Heir" in singular.

"Heirs of the body" their executors.

Executory trust.

"Heirs of the body" construed by context.

Heirs of the wife's body taking husband's property.

from the body of the wife, the heirs take as purchasers.

Example.—Where by a marriage settlement, a term belonging to the husband (see 1 P. Wms. 134), was assigned to trustees on trust “to permit and suffer the husband and wife, and the survivor of them, to receive the profits for so many years of the term as they or the survivor of them should happen to live, and after their deaths to the use of the heirs of the body of the wife by the husband to be begotten;” held, that the “heirs of the body” took by purchase, it being considered as analogous to the case of a wife tenant in tail, *ex provisione viri* under 11 H. 7, c. 20; *Peacock v. Spooner*, 2 Vern. 195; S. C., Freem. Ch. Rep. 114; and cited 1 P. Wms. 134. This case was followed in *Dafforn v. Goodman*, 2 Vern. 362; S. C., *sub nom. Dafferne v. Bolt*, Prec. Ch. 96. See these cases discussed, Fearn, C. R. 493.

Where ancestor takes a term of years only.

Fifth Exception.—It has been held in one case that where the trust for the ancestor was for “ninety-nine years if he should so long live,” the children took by purchase; *Ward v. Bradley*, 2 Vern. 23, cited 1 P. Wms. 134.

“Heirs” meaning children.

Sixth Exception.—The context may show that by “heirs” is meant children. See *ante*, Rule 92, p. 256.

Trust in remainder for heirs of the body.

Rule 97.—A trust of personalty for the “heirs of the body,” in remainder after the death of the ancestor, vests in such of his statutory next of kin as descend from and survive him.

Examples.—In *Ward v. Bradley*, *supra*, 2 Vern. 23, where the trusts of personalty were for A. for ninety-nine years if he lived so long, then to his wife for life, remainder to the heirs of A. begotten on his wife; it

was held, that on the death of A., the children who survived him took equally. In order to understand this case the report in Vernon and the citation in 1 P. Wms. 134, must be compared. It will be observed that the decision in *Ward v. Bradley* does not show that a child in order to take must survive the propositus; but the reasoning in *Re Jeaffreson's Trusts*, L. R. 2 Eq. 276, seems to show that the rule as above laid down is correct.

CHAPTER XVIII.

USES (a)—ESTATES OF TRUSTEES.

Use, by what words created: Use on use: To use of A. yielding rent to B.: Where grantee to uses and cestui que use the same person: Use limited less than estate of grantee to uses: Limitation in tail to uses: Where trustees take legal estate: Active and passive trusts: "Pay to or permit to receive:" Legal estate of trustees not enlarged or diminished: Equitable limitations.

Use, how
created.

Rule 98.—No special form of words is necessary to create a use; see *Fox's Case*, 8 Rep. 93*b*; 1 Sanders, Us., ch. 2, s. 2 (3); *Coulthman v. Senhouse*, T. Jones, 105. See 2nd Instit. 672.

Examples—(1) **Uses raised.**—A. made a feoffment in fee, *sub conditione, et intentione* that his wife should have the land for her life, with remainder to his younger son in fee; *held*, that it was not a condition but an estate which was presently executed according to the intent; *Anon.*, 4 Leon. 2 (pl. 3).

Fine levied to four, and by indenture between the parties to the fine it was declared that the said fine was levied *et intentione* that the conusees should make an estate of the said land to such a person which the

(a) As to the consideration necessary for raising a use, see *ante*, p. 149; as to the exploded doctrine that deeds to uses are to be construed differently from common law conveyances, see 1 Sanders, Us., Ch. 2, s. 4, pl. 122 *et seq.* (5th ed.), and 4 Cruise Dig. Tit. xxxii. Ch. xx. s. 69 *et seq.*, and the cases there cited.

conusor should name; with a proviso that the conusees should not be seised to any other use but to that which was specified before, and that the conusees should not encumber the said land; *held*, that the conusees were seised to their own use until the conusor make nomination, and if he die without any nomination, then the use should vest in his heir; *Bettuan's Case*, 4 Leon. 22.

Charter of feoffment, Boydell to Thomas and Randall Crew; and by an indenture of even date between the feoffees and feoffor, after reciting the charter of feoffment, it is witnessed that immediately after the feoffees, their heirs and assigns, had enjoyed the land for 101 years, that then it should be lawful for the feoffor and his heirs to re-enter. The two deeds had several labels which were joined together in one seal. *Held*, that it was the intent of the feoffment that the feoffor should have the land again after the 101 years, and that the intent is the use of the feoffment; *Boydell v. Walthall*, Moo. 722.

"If a man covenants for consideration to be seised to the use of himself for life, and after to the use of his son, but he further says, that his meaning is his wife shall have it for her life, this is not a void clause, but good to the wife;" *per Periam, J., Carter v. Kungstead*, Ow. 84.

"Forasmuch as the intention of the parties is the creation of uses, if by any clause in the deed it appears that the intent of the parties was to pass it in possession by the common law, there no use shall be raised;" *Fox's Case*, 8 Rep. 94a.

"Now it is not necessary in declaring a use, if there be transmutation of possession, to use the very word *use*. Any expression whereby the mind of the party may be known that such a one shall have the land, is sufficient . . . Now in this case, here is an agreement between the husband and wife, which, though void as an agreement, yet is good to declare a use. As suppose a man at this day make a bargain and sale, and the deed is not inrolled, or make a charter of feoffment and there is no livery, yet they will

be sufficient to declare the use of a fine afterwards levied between the same parties ;" *per* Holt, C. J., *Jones v. Morley*, 12 Mod. 162, 163.

B., being mortgagee in fee simple of certain lands, and the equity of redemption belonging to A., B. and A. released to H. in fee by way of mortgage subject to a proviso for redemption in favour of A., with power of sale to H. (the new mortgagee). The deed contained a proviso for quiet enjoyment by A. till default, and a proviso that "if at any time hereafter, when and so soon as H. and every other person claiming or to claim by, from, through, or under him, shall, under or by virtue of any power or authority herein contained, enter into or upon or shall otherwise become possessed of the said premises or any part thereof, the same shall from thenceforth be subjected and charged to and with the payment to A., his heirs and assigns, of the annual sum of £40, and the same shall become recoverable by distress or otherwise upon or out of the mortgaged premises." H. did not execute the deed. H. entered into possession. *Held*, that, though the £40 a year, since it was charged in favour of a person who had no legal estate in the land, was not a rent reserved at common law, still it was well created as a rent by the limitation of a use ; *Gilbertson v. Richards*, 4 H. & N. 277 ; S. C., 5 H. & N. 453.

Examples—(2) Uses not raised.—Covenant by a father on the marriage of his son not to alienate, but that the lands shall descend to the use of the son and the heirs male of his body ; 1 Anders. 25 (pl. 55) ; S. C., Bendl. 121 (pl. 153) ; S. C., 3 Leon. 6 (pl. xviii.), where it is stated that the father was *cestui que use* in tail.

Covenant by a man seised of land, on the marriage of his son, that the land shall after his death remain and be to his son and his intended wife and the heirs of the son, to the use of the son and his intended wife and to the heirs of the son ; *held*, no use ; *Buckler v. Symons*, 22 Viner, p. 211, *Uses* (O. 4), pl. 1 ; S. C., 2 Roll. Ab. 788.

Rule 99.—A use cannot be limited on a use ; Use on a use.
 Sand. Us., ch. 2, s. 8 (6), p. 275 (5th ed.).

Bargain and sale for value enrolled, “ to G., *habendum* to G. and his heirs, to the use of J. for life, remainder to the use of G. and the heirs of his body, remainder to the use of the heirs of J. ; ” *held*, that the limitation of uses was void at law ; *Tyrrel's Case*, 2 Dy. 155a, pl. 20.

One infeoffed his two sons to the use of himself for life, after to the use of them and their heirs *ad ultimam voluntatem suam perimplendam*, and afterwards devised in fee ; *held* at law, that the devisee should not have the land, because a use cannot be limited on a use, so that, “ when he limits it to the use of his sons and their heirs, he cannot afterwards limit it to the uses of his last will ; ” *Girland v. Sharp*, Cro. Eliz. 382.

Conveyance by lease and release to W. and E. and their heirs, *habendum* unto W. and E., their heirs and assigns, to the use of W. and E., their heirs and assigns, to the uses, &c. ; *held*, that though W. and E. were, under the following rule, in at common law, still they took the legal estate, and that the uses following gave equitable interests only ; *Doc d. Lloyd v. Passingham*, 6 B. & C. 305 ; see also *Whetstone v. Saintsbury*, 2 P. Wms. 146.

Exception.—Where land is limited to the use of A. To use of A., yielding rent to B. and his heirs, yielding a rent to B. and his heirs, the rent is well created by way of use under the statute ; *Lord Cromwell's Case*, 2 Rep. 69a ; *Gilbertson v. Richards*, 4 H. & N. 277, at 296 ; S. C., 5 H. & N. 453 ; *ante*, p. 266.

Rule 100.—Where in a conveyance at Common Uses declared on A.'s seisin in favour of A. Law to A., uses are declared on A.'s seisin in favour of A. himself, A. is in by the Common Law, not by the Statute of Uses, unless the estate declared in A.'s favour by the uses is less than that which A. takes at Common Law ; in which

case the uses are executed by the Statute; Sand. Us., ch. 2, s. 2, p. 89 (5th ed.).

Examples.—Gift of land to husband and wife, *habendum* to husband and wife to the use of them and the heirs of their bodies; *held*, that they took an estate tail, on the ground that it was not a use executed by the statute, in which case the estate given by the use could not be more than the estate out of which it was derived, but was a limitation of the estate to them and the heirs of their two bodies, and they were in by the common law; *Jenkins v. Young*, Cro. Car. 230; S. C., W. Jo. 253, pl. 3, and sub nom. *Meredith v. Joans*, Cro. Car. 244; see also *Younge v. Dymock*, Dy. 186a (pl. 1), note.

Fine levied with declaration of use to the conusee and his heirs; *held*, that he was in at common law, not by the statute; *Long v. Buckeridge*, 1 Stra. 106; and *per Holt*, C.J., *Altham v. Anglesey*, Gilb. 16.

Fine levied to the use of C. and his heirs till a marriage should take effect, and then to the use of the wife, remainder to the use of the conusees and their heirs during the life of C., in trust to preserve contingent remainders, and that they should permit him to receive the profits, then to the use of C.'s first and other sons by a certain wife in tail, then to the use of the heirs males of C.'s body with remainders over; *held*, that the conusees took by the Statute of Uses, "because the limitation of the use is different from the estate of the land, as where a feoffment is made to the use of the feoffee for life, remainder to J. S., the feoffee is in by the statute. Feoffment to A. and his heirs, to the use of A. and B., and his heirs, they are joint tenants; the difference is that where the last fee simple of the use is limited to him who hath the estate in the land, he is in by the common law, as in the case Inst. 22b, where a feoffment is to the use of the feoffor in tail, and after to the use of the feoffee in fee;" *Tipping v. Cosins*, Comb. 312; S. C., Carth. 272; 4 Mod. 380; Holt, 781.

Feoffment, in consideration of a sum paid by the

feoffees, *habendum* to the feoffees and their heirs for ever, to the use of the feoffees for ever; with a clause of warranty to the feoffees, their heirs and assigns *in formâ prædictâ*: *held*, that they took for life only; *Wilkes v. Leuson*, Dy. 169 (a), pl. 21.

A., B., and C., being tenants in common in tail, B. released to A. and C. and their heirs his share, *habendum* to them, their heirs and assigns, as tenants in common, and not as joint tenants, to the use of them, their heirs and assigns. It was admitted that though, if the use had been executed by the statute, they would have been joint tenants, yet, as they were in at common law, they took as tenants in common; *Doe d. Hutchinson v. Prestwidge*, 4 M. & S. 178.

M., a tenant in tail in possession of real estate, executed a deed inrolled as a disentailing assurance, by which he granted it to A. and B. and their heirs, free from all his estates tail, to the use of A. and B. and their heirs, in trust for the grantor. A. and B. did not execute the deed, and subsequently executed a disclaimer. *Held*, that the disentailing deed operated at common law, not under the statute, and therefore was rendered inoperative by the disclaimer; *Peacock v. Eastland*, L. R. 10 Eq. 17.

A., seised in fee, by indenture grants a rentcharge to "B., C., D., and their heirs," *habendum* "unto the said B., C., and D., their heirs and assigns, to the use of the said B., C., and D., their heirs and assigns for ever as tenants in common in equal shares; *held*, that the use being specific, and not inconsistent with the *habendum*, the whole *habendum* must be read as specific, and, so read, the deed operated as a grant at common law, not under the Statute of Uses: *Grove, J.* (at p. 289), said, "If the estate is changed the use is executed by the statute; if the estate is the same, the grant takes effect by the common law;" *Orme's Case*, L. R. 8 C. P. 281.

Release by freeholder to a copyholder "unto the said J. S., *habendum* unto J. S. and G. S., their heirs and assigns, to the use of J. S. and G. S., their heirs and

assigns for ever ;" *held*, that though, as G. S. was not named in the premises, he could take nothing in the *habendum*, yet the use limited to J. S. and G. S. and their heirs is good. And it was said (56) that, "if a man maketh a feoffment in fee to one, to the use of him and the heirs of his body ; in this case, for the benefit of the issue, the statute according to the limitation of the uses, divests the estate vested in him by the common law, and executes the same in himself by force of the statute, and yet the same is out of the words of the statute of 27 H. 8, which are, where any person, &c., stand or be seised, &c., to the use of any other person ; and here he is seised to the use of himself : and the other clause is, where divers and many persons, &c., be jointly seised, &c., to the use of any of them, &c. ; and in this case A. is sole seised : but the statute of 27 H. 8 hath been always beneficially expounded, to satisfy the intention of the parties, which is the direction of the use according to the rule of the law. So if a man, seised of lands in fee simple, by deed covenants with another, that he and his heirs will stand seised of the same land, to the use of himself and the heirs of his body, or unto the use of himself for life, the remainder, over in fee ; in that case, by the operation of the statute, the estate which he hath at the common law is divested, and a new estate vested in himself, according to the limitation of the use ;" *Samme's Case*, 13 Rep. 54. See also *Wats v. Ognell*, Noy, 124 ; *Reading v. Norris*, Dy. 200a, note.

Rule 101.—Where grantee to uses and *cestui que use* are not the same person, and the estate of the grantee to uses is less than the estate declared by the uses, the latter will determine with the former ; 1 Sand. Us., ch. 2, s. 2 (5), p. 107 (5th ed.).

"Where an estate is limited to one, and the use to a stranger, there the use shall not be more than the estate out of which it is derived ;" *Jenkins v. Young*, Cro. Car. 280.

Examples.—Land given to two, *habendum* to them for the term of their lives and that of the longer liver of them, to the use of A. for the term of his life; *held*, that the estate of A. determined on the death of the survivor of the two; *Anon.*, Dy. 186*a*, pl. 1; Shep. Touch. 106.

Observation.—The rule does not apply where the grantee to uses is also the *cestui que use*; see *Jenkins v. Young*, Cro. Car. 230; S. C., W. Jo. 253, pl. 3, and sub nom. *Meredith v. Joans*, Cro. Car. 244.

There is some difference of opinion as to whether, where a limitation is made in tail to uses, the uses will take effect or not. Limitation in tail to uses.

The learning on this question, which is now of but little importance, will be found in Co. Lit. 19*b*; *Cromwell's Case*, 2 Rep. 69*a* (see 78*a*); *Cowper v. Franklin*, 3 Buls. 184; S. C., sub nom. *Cooper v. Franklin*, Cro. Jac. 400; S. C., sub nom. *Franklin's Case*, Godb. 269; Viner, *Uses*, C., pl. (2), pl. (3); Shep. Touch. 516. See, on the analogous question as to what is the effect of a covenant by tenant in tail to stand seised to uses, *Machil v. Clerk*, 7 Mod. 18, and the cases there referred to.

Rule 102.—Where the legal estate is vested at Common Law in trustees, on trusts for the benefit of another which require the active performance by them of some duties, such as to pay the rents and profits to another, to pay debts, to keep in repair, or the like, they retain the legal estate; but, on the other hand, if they have to perform no active duties, but merely to allow A. to receive the rents and profits, A. takes the legal estate; see Shep. Touch. 506, 527; Lewin on Trusts, Ch. XII. s. 1, p. 192 (7th ed.). When trustees take legal estate.

Examples.—Feoffment in fee to the use of the feoffor

for life, and after his decease that A. should take the profits; the use is executed in A. But, on the contrary, if he said that after his death the feoffees should receive the profits and pay them to A., the use would not be executed in A., because he could only have the profits by the hands of the feoffees; 36 H. 8, Bro. Abr. *Feoffements al Uses*, 840, pl. 52.

Conveyance in a marriage settlement to R. and J. and their heirs upon the trusts and for the uses, &c.; that is to say, in trust for P. (the intended husband) and his heirs till marriage, and then in trust to permit and suffer M. (the intended wife) and her assigns during her life, and notwithstanding her coverture, to receive and take the issues and profits thereof to and for her and their own sole and separate use free from the debts, control, and engagements of P., and her receipts alone notwithstanding coverture to be good and sufficient discharges for the same, and after her death in trust for P. and his assigns for life, and after the death of the survivor, in trust for the children of P. by M. as they should appoint. P. and M. appoint to such uses as their son F. should appoint; F. appoints the remainder in fee. *Held*, on ejectment after the deaths of P. and M., that all the estates of the beneficiaries under the settlement, with the possible exception of that of M., were legal; *Nash v. Ash*, 1 H. & C. 160. In this case it was not necessary to determine the nature of the estate of the wife, but the following case shows the distinction between a mere trust for the separate use of a married woman during her life, which gives her the legal estate, and a trust to pay the rents to her for her separate use during her life, which leaves the legal estate in the trustees (see *Blaker v. Anscombe*, 1 Bos. & P. N. R. 25).

Limitations to
separate use
of married
woman.

Conveyance by settlement (lease and release) on marriage to trustees and their heirs to the use of A., the intended wife, her heirs and assigns till the marriage, and afterwards in trust for A. and her assigns during her life, for her own sole and separate use independent of the intended husband, his debts, control, and engagements,

with remainders over; *held*, that the wife took the legal estate; Parke, B., said, "We cannot collect clearly, from the words of the deed, that they intended to give the trustees an *active trust*, to exclude the husband from control, by giving the estate to the trustees in order to pay over the rents and profits to the wife. The limitation to her sole and separate use is therefore void at law, and the use is executed in the wife although the husband is a trustee for her in equity;" *Williams v. Waters*, 14 M. & W. 166. See the remarks on this case in *Williams on Settlements*, 53.

See the cases on Wills collected in the notes to 2 Wms. Saund. 11b, *et seq.* (vol. 2, p. 55, ed. 1871); 3 Bythewood by Jarman, 227; 11 *ib.* 392; 2 Jarm. on Wills, 289; *et seq.*; Hawkins on Wills, 140.

I have been unable to find any case on a deed where the trust was "to pay unto or permit and suffer A. to receive" the rents. In *Doe d. Leicester v. Biggs*, 2 Taunt. 109, where these words occurred in a will, it was held that they gave the legal estate to the *cestui que trust*, on the ground that the words "permit and suffer" followed the words "to pay unto," and that (*b*), where there is a repugnancy, the first words in a deed, and the last words in a will, prevail. If this reasoning holds good, these words occurring in a deed would leave the legal estate in the trustees. See also *Baker v. White*, L. R. 20 Eq. 166.

"Pay to or permit to receive."

Rule 103.—The legal estate limited to trustees will not be enlarged or diminished by the circumstance that the nature of the trusts requires a larger, or would be satisfied by a smaller, estate. (*Contra* in the case of a will before 1838; Hawkins on Wills, 143.)

Legal estate of trustees not enlarged or diminished by nature of trusts.

Examples.—The uses of a recovery were declared to be to the use of B. and H., their heirs and assigns, during

the life of S., in trust to pay the rents as she should, notwithstanding coverture, appoint, with remainder to the use of her children as she should appoint, and in default to the use of the children, as tenants in common in tail with cross remainders; *held*, that the estate *pur autre vie* of the trustees could not be considered as commensurate with the limitations of the settlement. Heath, J., said, "There is a distinction between limitations by settlement and limitations by will; in the latter case they are construed according to the intention of the testator, and then the trustees, under a limitation of this sort, might be considered as having an estate commensurate with the subsequent limitations; but that mode of construction cannot be applied to a limitation by settlement;" *Blaker v. Anscombe*, 1 Bos. & Pul. N. R. 25.

The uses of a recovery were declared to be to the use of S. for life, remainder to the use of L. and E. and their heirs during the life of S., in trust to support contingent remainders, remainder to the use of H. for life, remainder to the use of L. and E. and their heirs, in trust to support contingent remainders, with remainders over in tail, with remainder to such uses as H. should appoint; *held*, that the second limitation to L. and E. gave them an estate in fee simple; *Venables v. Morris*, 7 T. R. 342, 438; and see the remarks of Lord Kenyon, C. J., in *Doc d. Lee Compere v. Hicks*, 7 T. R. at p. 437, where he says that it was necessary that the fee should be in the trustees so as to support any contingent remainders limited under the power. Query, is not the decision right but the reason given for it wrong?

Power in a will for tenants for life to appoint to trustees, upon trust to raise and pay a jointure. The tenant for life by deed appointed to trustees to hold to them and their heirs, upon trust to raise and pay the jointure. The Court of King's Bench certified, on a case sent from Chancery, that the trustees took an estate in fee simple; *Wykham v. Wykham*, 11 East, 458. The Court of Common Pleas was of opinion that the trustees took no estate; *Wykham v. Wykham*, 3 Taunt. 316.

Held, by the Court of Chancery, that they took an estate in fee simple; *Wykham v. Wykham*, 18 Ves. 395. Lord Eldon, C., said (at p. 420), "If you look to the executing instrument itself, it purports to be a grant in fee; and it is a deed. It purports to be a grant in fee for purposes certainly not requiring a fee, but still it purports to be a grant in fee; and it is, I think, difficult to maintain that, if a man does more, by using words which have a legal effect, than is necessary to execute the purpose he professes to execute, the circumstance that he uses those words of larger legal effect than is required, and his purpose, shall cut down the legal effect of the words in a deed."

Conveyance in marriage settlement to B. and his heirs, to the uses following, that is to say, to the use of C. for life, remainder to the use of his widow for life, remainder (in the events that happened) to the use of B., his heirs and assigns, on trust to take the rents and pay them to M. for life for her separate use, remainder as M. shall by will appoint; in default to the use of the heirs and assigns of M; *held*, that nothing in the deed cut down the legal estate given to B.; *Cooper v. Kynock*, L. R. 7 Ch. 398.

It has been argued that, where there is a limitation to trustees and their heirs generally, on trust to preserve contingent remainders, and in a subsequent part of the deed there is a limitation to the same trustees in fee, the estate of the trustees must be cut down to an estate *pur autre vie* during the estate of the tenant for life; but this construction has not prevailed, apparently on the ground that there is no such inconsistency in repeating the limitation of an estate in fee simple as to render it clear that the words could not bear their ordinary meaning; *Colmore v. Tyndall*, 2 Y. & J. 605; *Lewis v. Rees*, 3 K. & J. 182.

Exception.—Where there is a limitation to trustees and their heirs generally, and the object of that limitation ceases with the life of the tenant

"Trustees and their heirs" to preserve.

Limitation to trustees and their heirs cut down by context.

for life, and there is a subsequent limitation to the same trustees for an estate which would be inconsistent with their taking an estate in fee simple absolute by the former limitation, such limitation will be cut down to an estate *pur autre vie*.

Examples.—Conveyance to P. and J. and their heirs, to the use of M. for life, remainder to the use of E. if she continued unmarried, but if she should marry, to the use of P. and J. and their heirs, on trust out of the rents to pay an annuity to E. during her life, and with the rest of the rents and profits to maintain the children of M. and E., remainder after the several deceases of M. and E., to the use of P. and J., their executors, &c., for 1000 years, remainders over; *held*, that the estate in fee in P. and J. must be cut down to an estate during the life of E., as the subsequent limitation of a term to them was inconsistent with their taking an estate in fee simple absolute; *Curtis v. Price*, 12 Ves. 89 (see 3 K. & J. 145, 148).

Limitation to the use of W. for life, remainder to the use of N. and B. and their heirs on trust to preserve, remainder to the use of R. for life, remainder to the use of N. and B., their executors, &c., for the term of 500 years, remainder to the use of J. for life, remainder to the use of N. and B. and their heirs during the life of J., with remainders over; *held*, that the estate limited to the trustees in fee must be cut down to an estate *pur autre vie*, during the life of W.; *Beaumont v. Marquis of Salisbury*, 19 Beav. 198.

Equitable
imitations.

Rule 104.—An equitable limitation by way of trust executed has the same construction as a legal limitation.

“Any legal conveyance or assurance by a *cestui que trust*, shall have the same effect and operation upon the trust as it should have had upon the estate in law in case

the trustees had executed their trust;" *North v. Champnoon*, 2 Ca. Ch. 78.

See *per* Lord Northington in *Austen v. Taylor*, 1 Ed. 368; Ambl. 378; cited by Plunket, C., in *Herbert v. Blunden*, 1 Dr. & Wal. 91; and *per* Lord Mansfield, C.J., in *Burgess v. Wheate*, 1 Ed. 224; Lewin on Trusts, Ch. VIII., 7th ed. p. 99.

Examples.—By the marriage settlement of a widow having children, real estate was conveyed by her to a trustee in fee, upon trust for her separate use for life, with remainder in trust for her children as tenants in common, without any words of limitation; *held*, that the children took estates for life only; *Holliday v. Overton*, 15 Beav. 480.

Realty conveyed by marriage settlement to the use of trustees and their heirs upon trust for the wife and husband successively for life, and afterwards for the children, and in default as the wife should appoint, and in default for her next of kin, without any words of limitation. There were no children, and the wife made no appointment. *Held*, that the next of kin took for life only; *Lucas v. Brandreth* (No. 2), 28 Beav. 274.

Post-nuptial settlement vesting freeholds, copyholds, and leaseholds in trustees in fee, upon trust to permit the settlor's wife to receive the rents during the joint lives of her and the settlor and during her widowhood, and afterwards upon trust to convey and divide such estate and premises amongst their children and the issue of their children who should then be living as tenants in common, the issue of any deceased child to take their parent's share; *held*, that the children living at the time of division, and the children then living of those who were dead, took life estates only; *Tatham v. Vernon*, 29 Beav. 604.

Voluntary settlement vesting freeholds in trustees in fee, upon trust for the settlor for life, with remainder in trust for A. as and when he should attain twenty-one, with interim powers of maintenance. If A. should die under

twenty-one, or, having attained that age, should die in the lifetime of the settlor without leaving issue living at the death of the settlor, a trust over. A. attained twenty-one, survived the settlor, and died leaving issue. *Held*, that A. took for life only; *Middleton v. Barker*, W. N. 1873, p. 231; S. C., 29 L. T. N. S. 643.

By a marriage settlement land was vested in trustees in fee simple, on certain trusts during the lives of the husband and wife, and subject thereto "on trust for all and every the children of the marriage to be equally divided between or among them, if more than one, in equal shares as tenants in common, but if there shall be but one such child, then the whole to be in trust for that one child, the shares of such children being a son or sons to be conveyed or transferred to him or them or his or their representatives, as and when he or they shall attain his or their respective ages of twenty-one years or die under that age leaving lawful issue, and the shares of such of them as shall be a daughter or daughters to be conveyed or transferred to her or them when and as she or they shall attain the age of twenty-one years, or be sooner married." *Held*, that the children took for life only. *Meyler v. Meyler*, 11 L. R. (Ir.), 522.

Wills.

It will be observed that this rule differs from the rule applicable to the construction of wills made before the 1st Jan., 1838, where, if on the construction of the will the trustees take the whole legal fee in trust for A., without any words of limitation, A. takes the whole equitable fee; *Hawkins on Wills*, 137.

Leaseholds for lives.

Owing to the nature of an estate *pur autre vie*, where renewable leaseholds for lives are conveyed to trustees and their heirs upon trust for A., it has been held that A. takes the absolute interest; *Lewin on Trusts*, Ch. 8, s. 1, p. 99 (7th ed.), citing *M'Clintock v. Irvine*, 10 Ir. Ch. R. 480; *Brenan v. Boyne*, 16 Ir. Ch. R. 87; *Betty v. Elliott*, *ib.* 110, note; and *Re Bayley*, 16 Ir. Ch. R. 215.

CHAPTER XIX.

JOINT TENANCY. TENANCY IN COMMON.

Joint Tenancy, how created: Limitations to Corporations, together with ordinary persons: To Husband and Wife: Joint Purchases: Partnership Property: Mortgagees: Executory instruments: Where estates of different natures: Joint Tenancy for life with several inheritances: Where one grantee incapable: Benefit of Survivorship: To A. & B. and the survivor and heirs of survivor: Words implying distinct interests: Express gift to survivor: "Survivors" construed "Others."

Rule 105.—A limitation, either at Common Law or in a conveyance to uses, of estates of the same nature to several, either nominatim or as a class, without more, makes them joint tenants. The estates must begin at the same time if the conveyance is at Common Law, but this is immaterial if it be under the Statute of Uses. What limitations are joint.

Examples.—A remainder limited at common law to the heirs of A. & B., two living persons, makes them tenants in common, because their estates do not begin at the same time; 24 Ed. 3, 29a, cited *Justice Windham's Case*, 5 Rep. 8a; Co. Lit. 188a; *Samme's Case*, 13 Rep. 57. At common law.

"If a man make a feoffment in fee to the use of himself and of such wife as he should afterwards marry, Under statute of uses.

for term of their lives, and after he taketh wife, they are joint tenants, and yet they come to their estates at several times :” Co. Lit. 188*a* ; *Samme’s Case*, 13 Rep. 56*b* ; see also *Mutton’s Case*, Dy. 274*b*, S. C., Moo. 96, pl. 240 ; *Brent’s Case*, Dy. 340*a*.

Two persons were in lawful possession of land as tenants under the tenant for life ; on her death they remained in possession without paying rent till they had acquired a title under the Statute of Limitations ; *held*, that they were joint tenants, as they had acquired title at the same instant : *Ward v. Ward*, L. R. 6 Ch. 789.

Limitation by deed to “ issue male ” in remainder after the death of their father ; *held*, that the sons took as joint tenants for life : *Fitzherbert v. Heathcote*, cited 4 Ves. 794.

Limitation to the use of the husband for life, remainder to the use of the wife for life, remainder to the use of all the issues female of their bodies, and the heirs male of the bodies of such issues female ; *held*, that the daughters took as joint tenants for life, with several inheritances : *Matthews v. Temple*, Comb. 467 ; S. C., *sub nom. Sussex v. Temple*, 1 Ld. Ray. 310.

Use in a settlement in remainder after the death of the survivor of the husband and wife “ to permit all and every the children to take the rents to them and their heirs for ever ; ” *held*, that the children took as joint tenants : *Stratton v. Best*, 2 Bro. C. C. 233.

Trust of
personalty.

Trust of personality in a marriage settlement for A. for life, remainder for his children ; *held*, that the children took as joint tenants : *Staples v. Maurice*, 4 Br. P. C. 580.

Two corpora-
tions, or corpo-
ration and
person.

First Exception.—If estates in land are limited to two corporations sole, or to a corporation sole and an ordinary person, or to the Crown and an ordinary person, they take as tenants in common ; this exception does not extend to chattels, real or personal : Co. Lit. 189*b*, 190*a*.

Husband and
wife.

Second Exception.—If (before 1882) a limitation was made to, or trust declared for, husband and wife, in words

which, if they had been ordinary persons, would have made them joint tenants, they became tenants by entireties; see *Co. Lit.* 299*b*; *Grencley's Case*, 8 Rep. 71*b*; *Back v. Andrew*, 2 Ver. 120; *Green d. Crew v. King*, 2 Bl. 1211; *Ward v. Ward*, 14 Ch. D. 506; a consequence of which is that, if a limitation was made to husband, wife, and a stranger, the husband and wife took one moiety only, and the other person the other moiety: *Co. Lit.* 187*a*; *Back v. Andrew*, 2 Vern. 120: see also *Gordon v. Whieldon*, 11 Beav. 170, the case of a legacy.

Husband and wife and a stranger.

But if the gift is contained in a will dated before, but coming into operation after, 1883, the moiety taken by the husband and wife is divided between them, the wife taking one half of it for her separate use by reason of the Married Women's Property Act, 1882: *Re March*, 24 Ch. D. 222, S. C., on appeal, W. N. 1884, p. 170.

Third Exception.—Where a purchase is made by several, and is paid for by them in unequal shares, they become tenants in common in equity, even though the legal limitations be to them as joint tenants; *Robinson v. Preston*, 4 K. & J. 505; but if the money is paid in equal shares, they are joint tenants; *Hayes v. Kingdome*, 1 Vern. 33; *Usher v. Ayleward*, 1 Vern. 360; *Lake v. Gibson*, 1 Eq. Ca. Ab. 290, pl. (3); *Lake v. Craddock*, 3 P. Wms. 158; *Aveling v. Knipe*, 19 Ves. 441; unless the conveyance is made to one only; *Morris v. Barrett*, 3 Y. & J. 384. Even if the money is paid in equal shares, evidence of circumstances is admissible to prove an intention to hold in severalty; *Edwards v. Fashion*, Prec. Ch. 332; but direct evidence of intention to that effect is inadmissible: *Harrison v. Barton*, 1 J. & H. 287.

Purchase by several paid for unequally.

Equally.

Evidence of circumstances.

Fourth Exception.—Where the property is purchased for the purpose of joint trade: 2 Brownl. 99; *Jeffreys v. Small*, 1 Vern. 217; *Lake v. Craddock*, 3 P. Wms. 158; *Lyster v. Dolland*, 1 Ves. Jun. 431. See the remarks of Lord Eldon, C., in *Jackson v. Jackson*, 9 Ves. 596, and *see Davies v. Games*, 12 Ch. D. 813. The question, whether the property is to become part of the partnership

Purchase for purposes of trade.

estate, depends upon all the circumstances of the case : *The Bank of England Case*, 3 De G. F. & Jo. 645.

Mortgagees.

Fifth Exception.—Persons advancing money on mortgage in any shares are in equity tenants in common thereof: *Petty v. Styward*, 1 Rep. Ch. 57, S. C., 1 Eq. Ca. Ab. 290; *Rigden v. Vallier*, 2 Ves. Sen. 258; 3 Atk. 781. See *Morley v. Bird*, 3 Ves. 681, *per Arden*, M. R., who draws a distinction between mortgagees and volunteers taking under a will or deed of gift.

But on this exception, see the remarks of Page Wood, V.-C.; *Harrison v. Barton*, 1 J. & H. at 292.

Executory instrument.

Sixth Exception.—The tendency of the Courts is to construe words in an executory instrument importing joint tenancy as giving a tenancy in common: *Taggart v. Taggart*, 1 Sch. & Lef. 84; *Mayn v. Mayn*, L. R. 5 Eq. 150; *Staples v. Maurice*, 4 B. P. C. (ed. Tom.) 580; *contra*, *Bustard v. Saunders*, 7 Beav. 92; *Re Bellasis' Trust*, L. R. 12 Eq. 218.

See as to all these exceptions the notes to *Lake v. Gibson* and *Lake v. Craddock*, 1 W. & Tu. L. C. Eq.

The estates must be of the same nature.

Rule 106.—The estates of joint tenants must be of the same nature; one cannot be freehold and the other chattel; Co. Lit. 188a; one cannot be in possession and the other in reversion: Litt. s. 302.

Joint tenants for life with several inheritances.

But joint tenants for life may have several inheritances: Litt. s. 283. See this discussed, *Fearne*, C. R. 35 *et seq.* *Matthews v. Temple*, Comb. 467; S. C. *sub nom.* *Sussex v. Temple*, 1 Ld. Ray. 810.

A limitation to two men, or to two women, and the heirs of their bodies; Co. Lit. 182a; or to a man and woman who cannot marry and the heirs of their bodies; or to two men and one woman, and the heirs of their bodies; Co. Lit. 184a; makes them joint tenants for life, with several inheritances. But a limitation to a husband and wife, or to a man and woman who can marry, and to

the heirs of their two bodies, gives them an estate in special tail in the entirety; Co. Lit. 25*b*.; see Rule 78, p. 239.

A limitation to two successively for life, remainder to the heirs of their bodies, gives them a joint remainder in tail: Fearne, C. R. 36.

A limitation to two and the heirs, or heirs of the body of one, gives them joint estates for life, and the inheritance to one: Co. Lit. 184*b* (see the discussion in the note).

A limitation to two and their heirs (*not* heirs of the body), vests the fee simple in them jointly: Fearne, C. R. 35.

Miscellaneous.

If the limitation be to two, one of whom is not capable, the other shall take the whole; as if there is a gift at Common Law (see Rule 105), to a man and his first-born son, when he has no son, or to a man and to such woman as he shall marry, in either case, the man takes the whole: *Shelley's Case*, 1 Rep. 101*a*. See the point discussed, *Davies v. Kempe*, Carter, 2 (at p. 5); *Humphrey v. Taylor*, 1 Amb. 136; S. C., 1 Dick. 161; cases on wills.

"During their joint and natural lives," held to mean during their joint lives, and during the natural life of each of them: this construction was helped by the context: *Smith v. Oakes*, 14 Sim. 122.

It follows from Rule 18, *ante*, p. 85, that words stating that joint tenants for life are to have the benefit of survivorship, do not prevent them from being joint tenants: Co. Lit. 191*a*.

As to the construction of a limitation to A. & B. and the survivor of them, and the heirs of the survivor, see Mr. Butler's note to Co. Lit. 191*a*; Fearne, C. R. 357.

A joint limitation to A., B. and C., for their lives, or in tail, followed by a joint limitation to their heirs, gives them a joint estate in fee simple: Co. Lit. 183*b*, 184*a*.

As to a limitation to "the heirs of A. & B.," where A. is dead and B. alive, see *Hawes v. Hawes*, 14 Ch. D. 614.

One of donees not capable.

"Joint and natural lives."

Benefit of survivorship.

A. and B. and survivor and heirs of survivor.

Joint life estate and joint limitation to heirs.

"Heirs of A. and B."

Words giving
tenancy in
common ;

Rule 107.—A limitation to, or trust for, several, either nominatim or as a class, with any words implying a distinctness of interest, makes them tenants in common: Co. Lit. 188b. •

Examples.—“Equally to be divided ;” see *Fisher v. Wigg*, 1 P. Wms. 14 ; S. C., 12 Mod. 295 ; 1 Ld. Ray. 622 ; 1 Salk. 391 ; *Rigden v. Vallier*, 2 Ves. Sen. 252, S. C., 3 Atk. 731 ; *Goodtitle d. Hood v. Stokes*, 1 Wil. 341 ; *Anon.*, 2 Vent. 365.

“In rateable and equal manner ;” *Bois v. Roswell*, 1 Lev. 292.

Grant to L. T. & S. respectively, their respective executors, &c., of an annuity for the life of P., charged on certain lands, habendum to L. T. & S., their respective executors, &c., for the life of P. The deed contained covenants by P., with L. T. & S., their respective executors, &c. The consideration was advanced in equal shares by L., T., and S. *Held*, that L. T. and S. took the annuity in equal shares as tenant in common : *Fleming v. Fleming*, 5 Ir. C. R. 129.

Exception.—“Jointly and severally,” makes them joint tenants : *Slingsby's Case*, 5 Rep. 19a.

followed by
express gift
over to sur-
vivor.

Rule 108.—Notwithstanding some of the older cases, where the words implying distinctness of interest are followed by an express gift to the survivor, it is tenancy in common with a gift over to the survivor.

Examples.—*Clerk v. Clerk*, 2 Ver. 322 ; *Oakley v. Young*, 8 Eq. Ab. 537 ; see also *Ward v. Everard*, Salk. 390 ; S. C., *sub nom.* *Ward v. Everet*, 1 Ld. Ray. 422 ; Comb. 329 ; Carth. 340 (the reports differ as to the decision) ; *Kew v. Rouse*, 1 Ver. 353 (see the cases collected in the note) ; and the following cases on wills :

Taafe v. Conmee, 10 H. L. C. 64 (see p. 78); *Haddelsey v. Adams*, 22 Beav. 266; *Doe d. Borwell v. Abey*, 1 M. & S. 428; *Cranwith v. Pearson*, 31 Beav. 624.

Rule 109.—Where there is a limitation to several, “Survivors”
or to a class, as tenants in common in tail (or tail ^{read} “others.”
male) with remainder, as to the share of each, to
the “survivors,” and there is a gift over on failure
of issue (male) of all the donees in tail, the word
“survivors” will be construed “others.”

“Here the single question arises on the meaning of the word ‘surviving,’ which, indeed, is the only word that distresses the case. But, taking the whole context together, I do not think that that word renders the case doubtful. The fair construction of that word, standing in this context, is that on the death of one child without issue, that portion shall go to the surviving line of heirs, and not merely to one child surviving; it must go to the surviving children in their own persons, if living, or, if dead, to their issues. And in putting this construction, I do not think we proceed on conjecture merely; for the conclusion of this sentence is, ‘And in case all the said children should die without issue,’ then the remainder is limited to A. in fee. We cannot give effect to the word ‘all’ without determining that there must be cross remainders, not only as long as the individual children, but as long as the several lines of those children exist;” *per* Lord Kenyon, C. J.; *Doe d. Watts v. Wainwright*, 5 T. R. 431 (stated *post*, p. 292). See to the same effect, *Cole v. Sewell*, 2 H. L. C. 186; S. C., 5 Ir. Law Rep. 190; 6 Ir. Eq. Rep. 66; 2 Con. & L. 344; 4 Dr. & War. 1.

CHAPTER XX (a).

ESTATES BY IMPLICATION. RESULTING TRUSTS.

Reversion in grantor : Resulting uses to grantor : No resulting estate in person not owner of estate granted : Difference between limitations in remainder to heirs special and to heirs general of grantor : Cross remainders not implied : Resulting trusts.

AN estate by implication of law has place only by way of use, either by assurances operating under the statute or through the medium of a conveyance to serve the uses, and in devises. By the rules of the common law applicable to deeds, no intention will be presumed unless it is expressed : and consequently no estate will arise unless there be a limitation to pass that estate : see 1 Preston, Est. 190, citing *Gardner v. Sheldon*, Vaugh. 259, and *per Twysden, J.*, 2 Lev. 79.

Reversion in grantor.

Where A., seised in fee, creates a particular estate by a conveyance operating at common law, the reversion of the fee simple remains in A. Co. Lit. 22b.

No resulting use to grantor.

If A., seised in fee, conveys the whole fee simple by a conveyance operating at common law, for a valuable consideration, without any declaration of use, or, whether there be any valuable consideration or not, if the uses exhaust the fee, there is no resulting use to A. ; but

Resulting use to grantor in fee.

Rule 110.—If A. conveys the whole fee simple by a conveyance operating at common law, and

(a) As to the use that results to the grantor on a conveyance without consideration, see p. 149.

there is no consideration and no declaration of uses, there is a resulting use to him in fee simple : *Armstrong d. Neve v. Wolsey*, 2 Wils. 19 ; *Beckwith's Case*, 2 Rep. 58*a*. . *Secus* as to a conveyance before the statute of *Quia Emptores* ; *Dyer*, 146*b*, pl. 71.

Rule 111.—If A. conveys the whole fee simple by a conveyance operating at common law, then, whether there is consideration or not, if the uses declared do not exhaust the fee, so much of the estate as is not disposed of, reverts to A. ; *ante*, 149 ; *Fearne*, C. R. 42 ; *Co. Litt.* 23*a*, 271*a* ; *Audley's Case*, *Dyer*, 166*a* ; *Woodliffe v. Drury*, *Cro. El.* 439.

Resulting use to grantor of uses not disposed of.

One particular instance of the foregoing rule is of sufficient importance, having regard to the rule in *Shelley's Case* (see *ante*, p. 249), to be stated in the rule following :

Rule 112.—Where a use is limited which cannot commence till after the grantor's death, and either no use is limited to take effect in the grantor's lifetime, or, uses being limited, they are not commensurate with the grantor's life, the freehold will result to him, unless an express use be limited to him inconsistent with such an implication.

Resulting use to grantor.

The rule is so fully discussed in *Fearne*, C. R. 41, *et seq.*, that it is unnecessary to discuss it here. The cases cited by *Fearne* are *Pibus v. Mitford*, 1 Vent. 372 ; *Adams v. Tertenants of Savage*, 2 Salk. 679 ; *Rawley v. Holland*, 22 Vin. 189, Pl. 11 ; S. C., 2 Eq. Cas. Abr. 753 ; *Tippin v. Cosin*, Carth. 272 ; 4 Mod. 380 ; *Moor*, 284 ; *Holt*, 781 ; *Southcot v. Stowell*, 1 Mod. 226 ; 2 Mod. 207, 211 ; *Manderile's Case*, Co. Lit. 26 ; *Wills v. Palmer*, 5 Bur. 2615 ; S. C., 2 Bl. Rep. 687. Mr. *Fearne*

adds that this rule flows from the rule laid down by Coke (Co. Lit. 28a), that in a conveyance to uses without valuable consideration so much of the use as is undisposed of results to the grantor.

There is some difficulty in seeing what becomes of the freehold in cases like *Adams v. Tertenants of Savage*, 2 Salk. 679; S. C., 2 Ld. Ray. 854; *Rawley v. Holland*, 22 Vin. 189, Pl. 11; S. C., 2 Eq. Ab. 753; *Godbold v. Freestone*, 3 Lev. 406; *Bedford v. Russell*, or *The Earl of Bedford's Case*, Pop. 3; S. C., Moore, 718, cited 1 Rep. 180a, where the first use was to the grantor himself for ninety-nine years, and it was held that he took no estate by implication, notwithstanding that the use was not limited away from him during all his life.

Observation.—I have stated the rule as laid down in the notes to Fearn, but it should be observed that it is only true if the grantor be seised in fee, and that if he be tenant for life, the use undisposed of will not result to him; *Castle v. Dod*, Cro. Jac. 200, where it is stated that the fact that the grantee becomes liable to forfeiture is sufficient consideration to vest the use in him.

In connection with this subject, Fearn points out (p. 51) the difference "between a subsequent limitation to the use of the heirs special, and one to the use of the heirs general, in cases where the freehold is limited away from the grantor during his life; the latter leaves the old use in himself by way of reversion (b); but the former is a contingent remainder to his heirs special—that is, where the limitation is by way of use; for by a conveyance at common law the limitation to the heirs special of the grantor would be void; because a donor cannot make his own heir a purchaser, even of an estate tail, without departing with the whole fee."

Difference
between
remainder to
heirs general
and heirs
special of
grantor.

Implication in
favour of
grantor only.

Rule 113.—No estate can arise by implication, or by way of resulting use, to a person who was not the owner of the estate granted.

(b) As to limitations in deeds after 1833, see 3 & 4 Will. 4, c. 106, s. 3

The rule is stated in this form in Fearn, C. R. 49, citing *Davies v. Speed*, 2 Salk. 675 (this report is incorrect; in "2ndly, This limitation to the heirs of the body, &c.," dele "of the body"); 4 Mod. 153; S. C., Holt, 780; Show. P. C. 104; *Sir Thomas Tipping's Case*, cited 1 P. Wms. 859; and some cases of devises.

The rule applies to equitable interests in personalty; *Pringle v. Pringle*, 22 Bea. 681.

Rule 114.—Cross-remainders cannot be raised in a deed by implication, nor even by an express declaration of intention, without apt words of limitation. But in the limitations of cross-remainders the word "survivors" may be read "others," for the purpose of giving effect to the intention. See *ante*, Chapter XIX., Rule 109.

Cross limitations are never implied.

"Of the general rule [that cross-remainders cannot be raised in a deed by implication] there is no doubt The rule, when correctly understood, is in truth only a branch of the general rule, that no estate of inheritance can be created by deed without apt words indicating the estate to be taken; that is, 'heirs' to create an estate in fee, 'heirs of the body' to create an estate tail. When lands are conveyed by lease and release, or other assurance, to the use of A. and B., as tenants in common, and the heirs of their respective bodies, A. and B. have estates tail, each in his own undivided moiety; but it is clear that neither of them has any estate tail whatever in the other's moiety. Let us suppose, in order to put the case as strongly as possible in favour of cross-remainders, that the deed conveying the land should contain a clause expressly stating the intent of the parties to be, that, in case A. or B. should die without heirs of his body, his moiety should go over to the other, by way of cross-remainder in tail. Then, supposing these to be the very words used, there could be no doubt as to what the parties intended: but it is certain that, in the event of

A. or B. dying without issue, the intention could not be carried into effect for want of the words 'heirs of the body,' connected with the gift over by way of cross-remainder; and as this cannot be done by any words except the words 'heirs of the body' (a), however clearly the language may show the intention of the parties, so *à fortiori* the object cannot be effected by any inference of intention, however clearly it may arise from the context;" *per* Pollock, C. B., *Doe d. Clift v. Birkhead*, 4 Ex. 124.

"In the case of a deed, cross-remainders cannot be implied. That rule, which was established in *Cole v. Levingston* (1 Vent. 224; S. C. 3 Keb. 2, where the limitations are stated), has never been departed from since, and we should be removing the landmarks of real property if we were to bring that rule into question;" *per* Lord Kenyon, C. J., *Doe d. Tanner v. Dorvell*, 5 T. R. 521.

See also note to *Cook v. Gerrard*, 1 Wms. Saund. at p. 186a (ed. 1871, Vol. I., p. 179).

Cross-re-
mainders not
raised.

Examples : (1) **Cross-remainders not raised.**—Limitation to the use of A. and B. and of the heirs male of the bodies of the said A. and B. lawfully to be begotten, and for default of such issue male of the body of either of them, then to the use of either of them having issue male of his body lawfully begotten, and for default of such issue male of both the bodies of the said A. and B. or either of them lawfully to be begotten, over: *Nevil v. Nevil*, 1 Brownl. 152; S. C. 1 Roll. Ab. 837, (R.), pl. 2.

Limitation to the use of all and every the daughter and daughters of the body of C. on the body of M. to be begotten, share and share alike, equally to be divided between them, and of the heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, and for default of such issue, over: *Doe d. Foquett v. Worsley*, 1 East, 416.

Limitation "to the use of all and every the child and

(a) Or in deeds since 1881, by the words "in tail." See the Conv. and Law of Property Act, 1881, s. 51.

children of the said intended marriage, both sons and daughters equally part and share alike, if more than one as tenants in common and not as joint tenants, and of the heirs of the body and bodies of all and every such child and children lawfully issuing; and in case there shall be more children than one of the said intended marriage, and any such child or children shall happen to die under the age of twenty-one years without issue of his or their body or bodies lawfully issuing, then and so often, and as to the part and share, parts and shares, of all and every such child and children so dying, to the use of the survivors of such children equally part and share alike, if more than one, as tenants in common and not as joint tenants, and to the heirs of the body and bodies of all and every such child and children lawfully issuing, until every such child and children shall be dead without lawful issue of their each and every of their bodies lawfully issuing; and in case there shall be but one child only of the said intended marriage, or one only surviving child thereof, then to the use of such only or only surviving child of the said intended marriage, be the same a son or a daughter, and of the heirs of the body of such only or only surviving child; and for default of such issue, or in case there should be issue of the said intended marriage who should all die without issue of his or their body or bodies lawfully issuing, under the said age of one and twenty years, then "over. There were two children, both of whom attained twenty-one. *Held*, that there were no cross-remainders in this event; *Levin v. Weatherall*, 1 Brod. & Bing. 401; S. C. 4 J. B. Moore, 116; see to the same effect, *Meyrick v. Whishaw*, 2 B. & Ald. 810.

Limitation "to the use of all and every the child and children of the body of A. on the body of B. lawfully begotten or to be begotten, equally to be divided between or among them; if more than one, share and share alike as tenants in common and not as joint tenants, and to the use of the several and respective heirs of the body and bodies of all and every such child and children law-

Cross-re-
mainders of
accrued
shares.

fully issuing ; and if there should be a failure of issue of the body or bodies of any such child or children, then as to the part or share, or parts or shares, of such child or children, when issue should so fail, to the use of the remaining and other children of the body of A. on the body of B. lawfully begotten or to be begotten, equally to be divided between or amongst them if more than one, share and share alike, and they to take as tenants in common and not as joint tenants, and to the use of the several and respective heirs of the body and bodies of such remaining and other children lawfully issuing ; and in case there should be a failure of issue of the bodies of all such children but one, or if there should be but one such child, then to the use of such only remaining or only child, and the heirs of his or her body lawfully issuing ; ” and for default of such issue, over. *Held*, that, though cross-remainders were well created as to the original shares, they were not created as to the accruing shares : *Edwards v. Alliston*, 4 Russ. 78 ; overruled by *Doe d. Clift v. Birkhead*, 4 Ex. 110. See next page.

Limitation of leaseholds for lives “ to the use of all and every the child and children of A. lawfully begotten or to be begotten, and if more than one, equally to be divided amongst them, share and share alike, as tenants in common and not as joint tenants, and of the several and respective heirs of the body and bodies of all and every such child and children lawfully issuing ; and if there shall be but one such child, then to the use of such only child and the heirs of his or her body lawfully issuing ; and in default of such issue to the use of the heirs of A. *Held*, that on the death of a child without issue and without having made any disposition, his share went to the heir of A. : *Bainton v. Bainton*, 34 Beav. 563.

Cross-re-
mainders
raised.

Examples : (2) Cross-remainders raised.— Limitation to the use of the child or children of A. as tenants in common if more than one and the heirs of their several bodies issuing ; “ and in case any such child or children should die without issue of his, her, or their body or bodies issuing, then the part or parts of him, her,

or them so dying without issue should be and remain to the use of the surviving child or children of the said A., and the heirs of his, her, or their respective bodies issuing, and so *toties quoties* as any of the said children should die without issue, till there should be only one child left; and in case all the said children should die without issue, or if the said A. should have no issue of her body," over. There were three children, John, Mary, and Robert. Mary married and died, leaving issue W. and two other children. John died without issue, and without having disposed of his share. *Held*, that John's share vested in W. and Robert, as tenants in common. Stress was laid on the ultimate gift over "in case all the said children should die without issue," inasmuch as effect could not be given to the word "all" without determining that there must be cross-remainders, not only as long as the individual children, but as long as the several lines of children, exist: *Doc d. Watts v. Wainwright*, 5 T. R. 427.

Limitation to the use of all and every the children of a marriage, "to be equally divided between them share and share alike, to take as tenants in common and not as joint tenants, and of the several and respective heirs of the bodies of all and every such children lawfully issuing; and in case one or more of such children should happen to die without issue of his, her, or their body or bodies, then, as to the share or shares of him, her, or them so dying without issue, to the use of the survivors or others of them, share and share alike, to take as tenants in common and not as joint tenants, and of the several and respective heirs of their bodies lawfully issuing; and in case all such children should happen to die without issue, or if there should be but one such child, then to the use of such surviving or only child, and of the heirs of his or her body lawfully issuing, and for default of such issue," over. The question was, to what interests the words of limitation applied: in other words, what was meant by the words "share or shares;" whether they applied to the accruing as well as to the original

shares. It was decided that the word "share," according to its natural and obvious meaning, includes, or at all events, if the context requires it, may include every interest which the child takes under the limitations in the settlement: *Doe d. Clift v. Birkhead*, 4 Ex. 110.

See also *Cole v. Sewell*, 4 Dr. & War. 1, where "survivors" was read "others" in favour of the intention: see p. 33; S. C. 2 H. L. C. 186.

**Executory
instruments.**

Observation.—In executory instruments cross-remainders may be raised by implication; *West v. Errissey*, 2 P. Wms. 349; *Phillips v. James*, 2 Dr. & Sm. 404, affirmed (*diss.* Knight-Bruce, L. J.), 3 De G. J. & S. 72.

**Resulting
trusts.**

Rule 115.—Where a declaration of the trusts of property vested in trustees does not exhaust all the interest vested in them, there is a resulting trust of the undisposed-of interest to the settlor; *Langham v. Nenny*, 3 Ves. 467; *Campbell v. Prescott*, 15 Ves. 500; *Wilson v. Paul*, 7 Sim. 620; *Hawkins v. Hawkins*, 7 Sim. 173; *Anon.*, 1 Giff. 392; *Pringle v. Pringle*, 22 Beav. 631; *Wollaston v. Berkeley*, 2 Ch. D. 213.

When a father covenants in his daughter's marriage settlement to pay a sum as her portion, it is considered to be settled by *her*, so that any interest undisposed of results to her; *Ward v. Dyas*, Ll. & Goo. tem. Sug. 177; unless a contrary intention appears, *Re Nash*, 51 L. J. Ch. 511; S. C. 80 W. R. 406; 46 L. T. 99.

**Trusts of
personalty for
wife "during
coverture."**

Examples.—Where in a marriage settlement trusts of the wife's personalty are declared for her *during coverture*, and no trusts are declared in the event of her surviving her husband during the residue of her lifetime, she takes a life interest in the fund by implication: *Tunstall v. Trappes*, 3 Sim. 312; *Allin v. Crawshaw*, 9 Hare, 382; see S. C., in 21 L. J. Ch. 873, whence it appears that the fund was settled by the wife's father, and not, as stated in *Tud. L. C. R. P.* 645, by her husband.

CHAPTER XXI.

ESTATES FOR LIFE. SEPARATE ESTATE.

Limitations to "A.": "A. and his assigns": "A. and his issue": Indefinite gift to A. not enlarged by direction that A. shall pay money, or by fee being given to trustees: Words creating separate use: Whether separate use arises immediately: Whether it revives on second marriage: Restraint on anticipation, how imposed: Separate estate alienable without express power: Restraint on anticipation annexed to power only: Restraint on anticipation annexed to reversion.

Life Estates (a).

Rule 116.—A conveyance of land, held in fee simple by the grantor, to "A.," or to "A. and his assigns," or to "A. and his issue," or to "A. and his seed," without more, confers on A. an estate for his own life; Litt. s. 1 (cited *ante*, p. 224); Co. Litt. 42*a*; Litt. s. 283, *ante*, p. 225; but if the grantor be seised for life, or in tail, A. takes an estate for the life of the grantor (*ante*, p. 94). Shep. Touch. 105, 107, 110.

Conveyance to A. or to A. and his assigns, &c.

Examples.—Limitation in a marriage settlement, after successive estates tail to the sons, to the daughters as tenants in common, and in default of such issue, over; admitted without argument that the daughters took for life only; *Snell v. Silcock*, 5 Ves. 469 (see p. 472.)

(a) As to a trust for a woman during coverture being construed as a trust for her during life, see preceding page.

Under a limitation in a marriage settlement to the "heir female of the body" of the settlor, his daughters took life estates; *Chambers v. Taylor*, 2 My. & Cr. 376; and under a limitation to "next of kin" they took life estates; *Lucas v. Brandreth* (No. 2), 28 Beav. 274.

Direction that
grantee shall
pay money.

Observation.—An indefinite limitation to A. is not enlarged into a fee simple by a direction that A. shall pay a sum of money: *Wright d. Allingham v. Dowley*, 2 Wm. Bl. 1185 (a).

Legal fee
limited to
trustees.

Observation.—An indefinite gift to a person or class is not enlarged by the fact that the legal estate is limited to trustees in fee. See Rule 104, *ante*, p. 276, and the cases there cited (b).

Renewable
leaseholds.

As to a conveyance of renewable leaseholds for lives to trustees and their heirs in trust for A., see *ante*, Ch. xviii., p. 278.

"A. and his
heir."

A limitation to A. and his "heir," or the "heir of his body," in the singular, gives A. an estate for life only, *ante*, pp. 225, 232.

"A. and his
executors."

As to limitations to "A. and his executors," or "his executors, administrators, and assigns," see *post*, pp. 314, 317.

Separate Use (c).

Words creat-
ing separate
use.

Rule 117.—In a gift to a woman, any expression

(a) *Secus*, in the case of a will before 1 Vict. c. 26. See the cases collected, 2 Jarman, 268.

(b) *Secus*, in the case of a will. See the cases collected, 2 Jarman, 273.

(c) Property acquired by a married woman after 1882, or previously acquired by a woman marrying after that date, becomes her separate estate by virtue of the Married Women's Property Act, 1882; 45 & 46 Vict. c. 75, without any expression excluding her husband. As to property constituted separate estate by the repealed Married Women's Property Act, 1870, see Elph. Introd. Conv. 269. Property acquired by a married woman and becoming her separate estate by virtue of the Married Women's Property Act, 1882, is not "property settled to her separate use" within the meaning of these words as used in an exception to a covenant for settling a wife's future property in a settlement before 1883; *Re Stonor*, 24 Ch. D. 195.

from which the intention to exclude her husband can be clearly inferred will have the effect of vesting the property in her for her separate use: 1 Wh. & Tud. L. C. Eq. (5th ed.) 561; Peachey on Settlements, 279.

“The intention to give a separate estate must be clearly expressed;” *per* Leach, M.R., *Kensington v. Dolland*, 2 My. & K. 188.

“For separate use there must be words referring to the event of marriage, and creating a separate character or directing an exclusive enjoyment;” *per* Lord Westbury, C., *Spirett v. Willows*, 34 L. J. Ch. 365; S. C., 13 W. R. 329.

“The *jus mariti* is not to be curtailed by ambiguous terms, but by clear and unanswerable expression of intention;” *per* Kindersley, V.-C., *Moore v. Morris*, 4 Drew. 37.

“No particular form of words is necessary in order to vest property in a married woman to her separate use. That intention, though not expressed in terms, may be inferred from the nature of the provisos annexed to the gift;” *per* Lord Brougham, C., *Stanton v. Hall*, 2 R. & M. at p. 180.

Where the protection of a woman about to marry is contemplated, words may be construed otherwise than in a gift by will to an unmarried woman whose marriage is not in the testator's contemplation: *Massy v. Rowen*, L. R. 4 H. L. at p. 297. On the other hand it appears that words in a deed, not being a marriage settlement, will not exclude the husband unless they would have done so if they had been in a will: *Tyler v. Lake*, 2 Russ. & My. 183.

Examples: (1) Words creating separate use under marriage settlements.—“Sole use, benefit and disposition;” *Ex parte Ray*, 1 Madd. 199; “full and sole use and benefit;” *Arthur v. Arthur*, 11 Ir. Eq. R. 511.

Separate use
created by
(1) marriage
settlements.

A direction that a jointure should be paid to K. "without anticipation," "the sole and separate receipt of the said K. to be a complete and only discharge:" *Re Molyneux's Estate*, Ir. R. 6 Eq. 411.

(2) Other deeds.

Examples: (2) Words creating separate use under deeds not being marriage settlements.—Direction for payment "into her own proper hands to and for her own use and benefit:" *Tyler v. Lake*, 2 Russ. & My. 188.

The words "not to be assignable, &c.," in a trust deed providing pensions for the widows and children of clerks in the East India Company's service had the same effect: *Re Peacock's Trusts*, 10 Ch. D. 490.

A husband may make himself a trustee of property for his wife's separate use: *e.g.*, by assigning a leasehold to her, habendum to her executors, &c., "as her separate estate:" *Fox v. Hawks*, 13 Ch. D. 822; see *Baddeley v. Baddeley*, 9 Ch. D. 113; but see the observations in *Re Breton*, *Breton v. Woollven*, 17 Ch. D. 416; *Re Whittaker*, *Whittaker v. Whittaker*, 21 Ch. D. 657; and *Hayes v. Alliance, &c., Co.*, 8 L. R. Ir. 149.

Separate use not created by marriage settlements.

Examples: (3) Words not creating separate use under marriage settlements.—Where part of the property of the intended wife was settled in the usual manner, and as to the residue, it was declared that it should not be subject to the settlement, but should be held "only" in trust for her, "her executors, administrators, and assigns," it was held that the residue was not settled to her separate use: *Spirett v. Willows*, 5 Giff. 49; S. C., affirmed, 34 L. J. Ch. 365. See also *Darcy v. Croft*, 9 Ir. Ch. R. 19; S. C., Dru. Rep. t. Nap. 408.

Separate use created by will.

Examples: (4) Where separate use was created by a will in favour of a married woman, or woman whose marriage was contemplated.—The cases on wills collected in 2 Jarm. (4th ed.) 24, note (r), Theobald on Wills (2nd ed.) 467 *et seq.*, show that the words "for the sole use," *Re Amies*, *Milner v. Milner*, W. N. 1880, 16; "sole benefit," *Green v. Britten*, 1 De G. J. & S. 649; "sole use and disposal," *Bland v. Dawes*, 17 Ch. D.

794; "own use and benefit, independent of any other person," *Margetts v. Barringer*, 7 Sim. 482; "to be at the disposal of," *Kirk v. Paulin*, 7 Viner, 95, pl. 48; "for her own use and at her own disposal," *Prichard v. Ames*, T. & R. 222; "solely and for her own use and benefit," *Inglefield v. Coghlan*, 2 Coll. 247; "her receipt to be a sufficient discharge," *Lee v. Pricaux*, 3 Br. C. C. 381; *Cooper v. Wells*, 11 Jur. N. S. 923; S. C. 13 L. T. 319,—will, if (d) the beneficiary be married at the date of the will, be sufficient to create a trust for her separate use.

The words, "her own sole use and benefit absolutely," raised a separate use in favour of a widow, where it appeared from another part of the will that the testator contemplated her re-marriage; *Re Tarsey*, L. R. 1 Eq. 561.

Examples: (5) **Words in a Will not creating separate use.**—The following words in gifts by will have been held not to create a trust for the separate use:—"to and for her own use and benefit," *Roberts v. Spicer*, 5 Madd. 491; "for her use and benefit," *Bullock v. Menzies*, 4 Ves. 798; "to and for her use," *Jacobs v. Amyatt*, 1 Madd. 376 n.; "sole and absolute use and benefit," *Lewis v. Mathews*, L. R. 2 Eq. 177; *Gilbert v. Lewis*, 1 De G. J. & S. 38; "sole use" (e), *Lindsell v. Thacker*, 12 Sim. 178, where the marginal note is incorrect; *Massy v. Rowen*, L. R. 4 H. L. 288; "to be paid into her hands for her own proper use and benefit," *Blacklow v. Laws*, 2 Hare, p. 49; "the interest to be for and under her sole control," *Massey v. Parker*, 2 My. & K. 174.

A question, sometimes of very great nicety, may arise, whether the separate use attaches immediately, or not until some future time: the cases are, perhaps, not easily reconcilable, but they appear to show that:—

First: Where a married woman takes an immediate

Separate use
not created
by will.

Whether
separate use
arises im-
mediately.

(d) See next note on *Hartford v. Power*, Ir. R. 2 Eq. 204.

(e) But see the remarks in *Hartford v. Power*, Ir. R. 2 Eq. at p. 212; cited in 1 Wh. & Tud. L. C. Eq. (5th ed.), 562-3, on the word "sole."

interest for her separate use, and words are added which apparently restrict the separate use to a future coverture, the generality of the first words is not controlled by the subsequent words, but the separate use arises immediately: *Steedman v. Poole*, 6 Hare, 193 (see *per Kay, J., King v. Lucas*, 23 Ch. D. at p. 717).

Secondly: When a married woman takes a vested reversionary interest for her separate use, it arises immediately: *Re Molyneux's Estate*, Ir. R. 6 Eq. 411; *Sturgis v. Corp.*, 13 Ves. 190.

Thirdly: Where a married woman takes a life estate on the happening of a mere contingency (such as the insolvency of her husband) for her separate use, the separate use does not attach till the contingency happens: *Mara v. Manning*, 2 Jo. & Lat. 311; *Bestall v. Bunbury*, 13 Ir. Ch. R. 549; *Keays v. Lane*, Ir. R. 3 Eq. 1.

Fourthly: Where policies of assurance on the life of the husband were assigned to trustees on trust to receive the money and pay the income to the wife for her separate use, it was held that the separate use did not arise during the husband's life: *King v. Lucas*, 23 Ch. D. 712.

Whether
separate use
revives on
second mar-
riage.

Where property is absolutely given to a married woman for her separate use, independently of a named husband, the separate use does not revive on her remarriage; *Moore v. Morris*, 4 Drew. 33 (see *Tudor v. Samyne*, 2 Vern. 270); but where she takes a life interest only for her separate use independently of a named husband, the separate use annexed to it revives on a future coverture; 2 Wh. & Tud. L. C. Eq. (5th ed.) 568, *et seq.*; *Re Gaffee*, 1 Mac. & G. 541; on app. from 7 Ha. 101; *Hawkes v. Hubback*, L. R. 11 Eq. 5; *Shafte v. Butler*, 40 L. J. Ch. 308; S. C., 19 W. R. 595; unless she deals with the property while not under coverture; *Wright v. Wright*, 2 J. & H. 647.

Divorce.

In the curious case of *Shafte v. Butler*, 40 L. J. Ch. 308, part of the husband's property was settled during the joint lives of himself and his wife for her separate use without power of anticipation. The wife obtained a

divorce and married again during his life. *Held*, that the separate use and restraint on anticipation revived.

Restraint on Anticipation by a Married Woman (f).

Rule 118.—No particular form of words is necessary in order to impose a restraint on anticipation (*per* Lord Cranworth, V.-C., *Re Ross's Trust*, 1 Sim. N. S. at p. 199); but the restraint will not be imposed unless the language is clear. Restraint how imposed.

Examples: (1) **Restraint imposed.**—Covenant in a marriage settlement to settle the wife's after-acquired property on trust to pay the income to the wife or her appointees, to the intent that the same might remain a separate personal and inalienable provision for her during the coverture, and on further trust to pay, assign, or otherwise dispose of the same from time to time to the wife's appointees by deed or will. *Held*, that the wife was entitled to an interest during the coverture for her separate use without power of anticipation, with power to appoint the reversion expectant on the interest reserved to her during coverture: *Spring v. Pride*, 4 De G. J. & S. 395. Restraint imposed.

Trust in a marriage settlement during the wife's life to receive the income as it should become due, and pay it to such person as she should from time to time appoint, or permit her to receive it for her separate use, with a declaration that her receipt or the receipts of any person or persons to whom she might appoint it after it became due should be discharges: *Field v. Evans*, 15 Sim. 375 (g).

Devise on trust for the testator's daughter and her

(f) See the Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, s. 19.

(g) See the remarks on this case by Stuart, V.-C., 2 Sm. & Gif. at p. 561, and by Knight-Bruce, L.J., 7 De G. M. & G. at p. 612, and the extract from the minute book at p. 609 (note).

assigns during her life, and to permit her to receive the income for her separate use, with a direction that her receipt alone or that of some person or persons authorized by her to receive any payment of the income after such income should have become due should, notwithstanding her marriage, be good discharges: *Baker v. Bradley*, 2 Sm. & Giff. 531; S. C., 7 De G. M. & G. 597; see *Re Smith, Chapman v. Wood*, W. N. 1884, p. 181. Bequest to separate use "not to be sold or mortgaged:" *Steedman v. Poole*, 6 Hare, 193.

Restraint
not imposed.

Examples: (2) **Restraint not imposed.**—Payment of income to be made to such persons as the wife "from time to time" should direct; *Pybus v. Smith*, 3 Br. C. C. 340; trust to pay income "from time to time as the same should become due and be received" "into the own hands" of the wife; *Glyn v. Baster*, 1 Y. & J. 329; the interest to be paid "on her personal appearance and receipt;" *Re Ross's Trust*, 1 Sim. N. S. 196; trust for separate use of married woman for life, and after her death for her appointees by deed or will, with a direction that any appointment by deed should not come into operation till after her death: *Alexander v. Young*, 6 Hare, 393 (all these, except *Pybus v. Smith*, are will cases). See also 1 Wh. & Tud. L. C. Eq. (5th ed.) 578, *et seq.*

Separate
estate is
alienable
without
express
power.

It was thought formerly, before the nature of separate estate was thoroughly understood, that a woman could not dispose of her separate estate unless she had an express power to do so; and accordingly, the older form gave the woman express power to dispose of the property, with a direction that, until and in default of any exercise of the power, the income was to be paid to her for her separate use. In some of the older cases, where the restraint on anticipation was annexed to the power only, it was held that, though the property could not be disposed of by anticipation under the power, yet it might be disposed of under the proprietary right conferred by the trust for separate use; *Barrymore v. Ellis*, 8 Sim. 1; but

Restraint on
anticipation
annexed to
power only.

this opinion is now overruled: *Brown v. Bamford*, 1 Phil. 620, followed in *Harnett v. Macdougall*, 8 Beav. 187.

It used to be considered that the effect of a restraint on anticipation annexed to a reversionary fund differed according as the fund did or did not produce income. It was considered that if it produced no income, the woman was entitled to have it paid to her on its falling into possession; *Re Croughton's Trusts*, 8 Ch. D. 460; *Re Clarke's Trusts*, 21 Ch. D. 748; *Re Bown, O'Halloran v. King*, 58 L. J. Ch. 881; 50 L. T. 796; *Re Coombes, Coombes v. Parfitt*, W. N. 1888, 169; *Re Taber, Arnold v. Kayess*, 51 L. J. Ch. 721; S. C. 30 W. R. 888; *Re Sarel*, 4 N. R. 321; S. C. 10 Jur. N. S. 876; (see *Re Gaskell*, 11 Jur. N. S. 780, *contra*): and that any attempt to dispose of it before it fell into possession failed; *Re Sykes' Trusts*, 2 J. & H. 415; but that, on the other hand, if it produced income, the trustees ought to retain it, and pay the income only to her; *Baggett v. Meux*, 1 Coll. 138; S. C., on app., 1 Phil. 627; *Re Ellis' Trust*, L. R. 17 Eq. 409; *Re Benton, Smith v. Smith*, 19 Ch. D. 277; *Re Clarke's Trusts*, 21 Ch. D. 748.

But in *Re Bown*, 27 Ch. D. 411, where all the prior cases are discussed, it was decided by the Court of Appeal that this distinction is erroneous, and that the effect of the restraint depends entirely on the intention expressed. So that, if the fund itself is given to the woman, she is entitled to have it paid to her, the only effect of the restraint being to prevent her from dealing with it before it falls into possession; and that, on the other hand, if the income only is given to her, the trustees must retain the fund, and pay the income only to her without anticipation.

Restraint
annexed to
a reversion.

CHAPTER XXII.

NEXT OF KIN. EXECUTORS. PERSONAL REPRESENTATIVES.

Next of kin, meaning of: Take as joint tenants: Next of kin according to the statute take as tenants in common: Husband, or wife, does not take as next of kin: Next of kin, when ascertained: Gifts to the "executors of A.," or to "A. with remainder to his executors:" "Executors or administrators" of A. take for benefit of A.'s estate: "Personal representatives."

IN applying the following rules it must be remembered—*first*, that by "next of kin" are meant the nearest relations according to the rules of the Roman law: *secondly* that husband and wife are not in any sense of kin to each other, although a widow is entitled to a share of her husband's property under the Statute of Distributions, and a widower takes his wife's chattels real by survivorship, her chattels personal by his marital right, and her choses in action on taking out administration to her. (See as to the nature of the widower's interest, Elph. Introd. Conv., 3rd edit., p. 268.)

Next of kin.

Rule 119.—"Next of kin" means the nearest blood relations to the propositus as distinguished from next of kin according to the Statute of Distributions. See Hawkins on Wills, 97, *et seq.*

"The words 'nearest and next of kin' are perfectly exempt from ambiguity, and in their general sense un-

questionably denote the persons nearest in proximity of consanguinity No evidence exists that the parties intended to refer to the statute. The statute clearly adverts to two classes, next of kin in equal degree, and next of kin by right of representation ; not confounding but expressly distinguishing them ;" *per* Plumer, M. R., *Brandon v. Brandon*, 3 Swan. 818 ; S. C. ; on rehearing, 4 W. R. 539, n. This decision was mentioned with approval by the Lords Commissioners Shadwell and Bosanquet, in *Elmsley v. Young*, 2 M. & K. 780.

"The common use which is made of the term 'next of kin,' in connection with the administration and distribution of personal estates in cases of intestacy, may occasionally have given rise to a notion, that the persons to whom the law gives the succession are legally and for all purposes to be considered as the next of kin ; yet this does not appear to be a notion which can be supported in law. The construction given to the term 'next of kin,' with reference to the statute of Car. II. shows that the next of kin entitled to administration and distribution are not deemed to be next of kin for all purposes ; and I apprehend that, in all other cases, the terms 'next or nearest of kin' must be construed according to their simple and obvious meaning, or according to the legal construction of the whole instrument in which they occur ;" *per* Lord Langdale, M. R., *Withy v. Mangles*, 4 Beav. 358 ; S. C. 10 L. J. N. S. Ch. 391 ; 10 Cl. & Fin. 215.

"The Statute of Distributions accurately preserves the distinction between 'next of kin' and those to whom it directs the distribution of the personalty. If there be no children, it directs the distribution of the estate equally to every of the next of kindred of the intestate, who are in equal degree, and those who legally represent them ; and then confines the representation within brothers' or sisters' children ; not treating the rights of those who take by representation as belonging to them as next of kin, but as derived from others, who, if they had lived, would have been next of kin. If the familiar expression 'next of kin under the statute' be considered

as having reference to this provision of the statute, it will not be found to be so inaccurate as has been supposed. The question, however, is not whether 'next of kin under the statute' has not been inaccurately used as describing those who are entitled under the statute, but whether the term 'next of kin,' without any reference to the statute, has received any such judicial construction. A short examination of the cases will show that the contrary is established by a very great preponderance of authority . . . I think that the appellant has wholly failed in proving that the term *next of kin*, used *simpliciter*, has by a technical or conventional construction obtained the meaning of 'those who would be entitled in case of intestacy under the Statute of Distributions: ' and I am, therefore, of opinion that these words must be construed in their natural and obvious meaning of nearest in proximity of blood ;" *per* Lord Cottenham, C., *Withy v. Mangles*, 10 Cl. & F. 248, 249, 253.

Reference to
intestacy.

It has been held that "next of kin of equal degree," meant next of kin *simpliciter*: *Anon.*, 1 Mad. 36; and that "the persons legally entitled thereto as the next of kin of A." meant his statutory next of kin: *Kidd v. Frasier*, 1 Ir. Ch. R. 518; that an express reference to intestacy is equivalent to a reference to the statute: *Garrick v. Lord Camden*, 14 Ves. 372 (a will case); but this is not the case where the reference is to death "unmarried:" *Halton v. Foster*, L. R. 3 Ch. 505; or "sole and unmarried:" *Re Webber's Settlement*, 17 Sim. 221; S. C., 19 L. J. N. S. Ch. 445 (the case of a deed).

Death
"unmarried."

A trust for the next of kin of A. "of his own blood and family" does not exclude next of kin of the half-blood: *Cotton v. Scarancke*, 1 Madd. 45.

"Next of kin"
take as
joint tenants.

Rule 120.—Under a gift to, or trust for, the next of kin *simpliciter*, they take as joint tenants.

Examples.—In a marriage settlement the ultimate trust of the wife's property was "for such person or

persons as at the time of her death shall be her next of kin." The wife died, leaving a father, mother, and child. *Held*, that they took as joint tenants: *Withy v. Mangles*, 4 Beav. 858; S. C., 10 Cl. & F. 215.

Where the words were, "for the next of kin as if she had not been married, and not including the husbands of both or either of her sisters." *Held*, that the sisters who were her next of kin took as joint tenants: *Lucas v. Brandreth* (No. 2), 28 Beav. 274.

See the cases on wills, 2 Jarm. 107.

If there be a settlement of realty upon "next of kin" without any words of limitation, the next of kin take as joint tenants for life only: *Lucas v. Brandreth* (No. 2), 28 Beav. 274. Realty limited to "next of kin."

Rule 121.—Under a limitation or trust of personality in favour of the next of kin according to the Statute, they take as tenants in common, in the shares specified in the statute. Next of kin according to the statute.

Example.—In a marriage settlement ultimate trust of wife's property "for such person or persons as at the time of her death shall be her next of kin under and according to the statute made for the distribution of the estates of persons dying intestate, but exclusively of" her husband "his executors, &c." *Held*, that the statutory next of kin took as tenants in common: *Re Rank- ing's Settlement*, L. R. 6 Eq. 601.

See the cases on wills, 2 Jarm. 109.

Rule 122.—A trust for the next of kin, or next of kin according to the Statute, does not include the surviving husband or wife of the propositus. "Next of kin" does not include husband or wife.

"The description of next of kin of the wife can in no respect apply to the husband. He is entitled to the personal property of his wife *jure mariti*; her personal property vests in him by the marriage (a). At

(a) See now the Married Women's Property Act, 1882.

the death of the wife, if it is necessary for him to have an administration to enable him to get in her personal property, the administration granted to him is granted to him as husband; and when you look at the statutes, there is no law that gives the husband a right by force of the statute to administer to his wife. The husband's right is supposed in all the statutes. The statute 21 Hen. 8, c. 5, which directs who shall have administration, takes no notice of the husband: they are to grant it to the widow or the next of kin, or both. That statute, therefore, does not take the widow to be the next of kin. It takes no notice of the widower; for the law gives it to him; and where it was necessary for him to have the authority of the Ecclesiastical Court to enable him to obtain her personal property, he had a right to it. The Statute of Frauds has a clause that the Statute of Distributions shall not prejudice the right of the husband; under an apprehension that his right might be considered to be affected by that statute. The husband is not of kin to the wife, nor she to him. She is not next of kin, but takes as widow;” *per* Lord Loughborough, C., *Watt v. Watt*, 3 Ves. 244. See also *Grafftey v. Humpage*, 1 Beav. 46; S. C. on app., 3 Jur. 622; *Cholmondeley v. Lord Ashburton*, 6 Beav. 86; *Kilner v. Leech*, 10 Beav. 362.

Examples.—The husband did not take under a trust in a marriage settlement for the wife's “next of kin or personal representative:” *Bailey v. Wright*, 18 Ves. 49; nor under a trust for “such person or persons as at the decease of the wife would have become entitled thereto under the statutes for the distribution of the personal estate of intestates:” *Noon v. Lyon*, 33 L. T. N. S. 199.

Persons taking under prior trusts may take under ultimate trust for next of kin.

It might be thought that where there is an ultimate trust in a settlement for the next of kin, or next of kin according to the Statute, persons taking prior interests under the same settlement would be excluded: but this is not the case.

Examples.—In *Elmsley v. Young*, 2 My. & K. 780, the tenant for life took under an ultimate limitation as one of the next of kin: in *Withy v. Mangles*, 10 Cl. & F. 215, a child who took an interest in the trust funds comprised in his mother's marriage settlement, contingent on his attaining twenty-one, but who died under that age, took a share under the ultimate trust for the mother's next of kin: and in *Smith v. Smith*, 12 Sim. 317, and *Upton v. Brown*, 12 Ch. D. 872, the result was similar.

Rule 123.—By the "next of kin," or "next of kin according to the Statute," are meant the persons who are next of kin, or next of kin according to the Statute, at the death of the *propositus*. "Next of kin" when ascertained (b).

Examples.—By a marriage settlement a fund was settled on the wife, if she should survive the husband, for life, remainder to their children who should attain twenty-one, &c.; in default of any such child, as the husband should appoint; in default of appointment, in trust for his next of kin according to the statute and as if he had died intestate. There was issue one son only. The husband died first without having appointed; then the son died under twenty-one, and lastly the wife died. *Held*, that the fund vested in the son as his father's next of kin at the father's death, and not in the persons who were next of kin at the son's death; *Smith v. Smith*, 12 Sim. 317.

By marriage settlement personalty was settled on trust for the separate use of A. (the intended wife) for life, with remainder for the issue of the marriage as B. (the intended husband) should appoint, and in default of issue, for B., if then living, or in case of his death, as he should by deed or will appoint, and in default of appointment, "then upon trust immediately after the death of A. without leaving B., or any child or children, grand-

(b) See 3 Dav. Prec. 189, note; and as to wills, Hawkins, 99 *et seq.*

child or grandchildren, her surviving, to pay the said principal sum and all interest which may then be due thereon to such person or persons as under the Statute of Distributions would *then* be entitled to the same as the next of kin of B. in case B. shall have died intestate." B. made no appointment; he died before A., without having any issue. *Held*, that the statutory next of kin of the husband at his death, and not those existing at the death of the wife, were entitled to the fund under this ultimate limitation: *Day v. Day*, Ir. R. 4 Eq. 385; S. C., 18 W. R. 417.

Personalty settled on marriage upon trusts for A. (the husband), and B. (the wife), successively for life, and for the benefit of the children, with an ultimate trust "if B. shall happen to die in the lifetime of A., then the trustees shall and do, immediately after the death of A. and failure of issue," assign, &c., the residue of the trust funds and premises to such persons as B. shall appoint, and in default of appointment, "in trust for such person or persons (other than and except A.) as shall *then* be the next of kin of B., and would have been entitled thereto under the statutes for the distribution of the personal estates of intestates, in case she had died sole and unmarried and intestate;" B. made no appointment; she died before A. without having any issue. *Held*, that her next of kin at her own death, and not those at the death of her husband, were entitled: *Wheeler v. Addams*, 17 Beav. 417.

See also *Upton v. Brown*, 12 Ch. D. 872; *Hunter v. Tedlie*, 7 L. R. Ir. 454.

The rule does not apply if it is expressly stated that the next of kin are to be ascertained at some other time.

Where the trust was "for such person or persons as at the time of the death of A. (the husband) shall be the next of kin of B. (his wife), and would be entitled to her personal estate as if she had died sole and unmarried,"

B. died in the lifetime of A. leaving five brothers, four of whom died in the lifetime of A. *Held*, that the surviving brother alone was entitled: *Re Webber's Settlement*, 17 Sim. 221; S. C., 19 L. J. N. S. Ch. 445.

In *Pinder v. Pinder*, 28 Beav. 44, where the ultimate trusts in a marriage settlement were:—"but if A. (the wife) shall die in the lifetime of B. (the husband), then, after the decease of B. and such failure of issue as aforesaid," as A. should appoint, and in default of appointment, "in trust for the person or persons who, under the statutes made for the distribution of estates of intestates, would then be entitled to the personal estate of A. in case she had survived B. and had died possessed of the same intestate," to be divided, &c.; and in *Chalmers v. North*, 28 Beav. 175, where the trusts were "for such person or persons as, at the decease of the wife, would, under the statutes for the distribution of intestates' effects, have been entitled to her personal estate, as her next of kin, in case she had survived her husband and afterwards died intestate;" it was held that the persons intended were those who would have been the wife's next of kin if she had survived and died immediately after her husband.

It is pointed out by Thesiger, L. J., in *Mortimer v. Slater*, 7 Ch. D. 329 (a case on a will), that there are three cases; *First*, where the word "then" is attached to the description of the class—in which case the class is to be ascertained at the time so pointed out, *i.e.*, the time of distribution; *Second*, where words of futurity without any adverb of time are attached to the description of the class; in which case the class is to be ascertained at the death of the propositus; *Third*, where the word "then" is used, not in connection with the description of the class, but in connection with the time when the interest of the class is to come into being; in which case the class is to be ascertained at the death of the propositus. See also *Hunter v. Tedlie*, 7 L. R. Ir. at 456.

See the cases collected 2 Jarman on Wills, 139.

In the case of *Doe d. Wright v. Plumtre*, 8 B. & Ald. 474, where real estate was settled after divers limitations Next of kin
of name of
B

“to the use of all and every the nearest of kin in equal degrees to *D. M.* at the time of her death of the name of *B.*, share and share alike as tenants in common, their heirs and assigns,” the Court intimated that the limitation would admit of four different constructions, viz., *1st*, the union of both characters, *i.e.*, that the party taking should be the nearest of kin, and should also have the name of *B.*; *2ndly*, that the party taking should be the nearest of kin of the stock and blood; *3rdly*, that he should be nearest of kin at the death of *D. M.* bearing the name of *B.*; and *4thly*, that he should be the nearest of kin at the death of *D. M.* born of the name of *B.*; and without deciding which was the correct construction, held that the fourth was not. See as to this case, 2 Jarm. 110.

“The executors of A.”

Rule 124.—A limitation, or trust of personalty, in favour of the executors of A. (a living person), or in favour of A. (a living person) for life, with remainder either mediately or immediately to his executors, vests the property absolutely in him, subject in the last-mentioned case to the rights of any persons taking in remainder after the life estate.

“If a man letteth lands to another for life, the remainder to him for twenty-one years, he hath both estates in him so distinctly as he may grant away either of them If a man make a lease for life to one, the remainder to his executors for twenty-one years, the term for years shall vest in him; for even as ancestor and heir are *correlativa* as to inheritance; (as if an estate for life be made to A., the remainder to B. in tail, the remainder to the right heirs of A., the fee vesteth in A. as it had been limited to him and his heirs;) even so are the testators and the executors *correlativa* as to any chattel. And therefore if a lease for life be made to the testator, the remainder to his executors for years, the chattel shall vest in the lessee himself as well as if it had been limited to him and his executors;” Co. Lit. 54b.

“There is a great difference between a limitation to the executors and administrators and a limitation to the next of kin. The former is, as to personal property, the same as a limitation to the right heirs as to real estate : but a limitation to the next of kin is like a limitation to heirs of a particular description ; which would not give the ancestor, having a particular estate, the whole property in the land ;” *per* Grant, M. R., *Anderson v. Dawson*, 15 Ves. 536.

The distinction between “executors” and “next of kin” is well illustrated by *Graftey v. Humpage*, 1 Beav. 46, where, by a marriage settlement, the ultimate trust of certain specified property of the wife was for her next of kin ; and the settlement contained a covenant by the husband to settle the other property of the wife on the same trusts as those of the specified property. At the date of the settlement certain property not mentioned in the settlement stood limited by a will on trust for the wife for life, remainder to her children, remainder as she should appoint, remainder “to her *executors, administrators, or assigns*.” The husband survived the wife ; there were no children, and the wife made no appointment. *Held* that the last-mentioned property passed to the husband as his wife’s administrator, and was bound by the covenant. S. C. on app., 3 Jur. 622.

“The authorities fully establish that the effect of a settlement by deed limiting property to the executor or administrator of the settlor is to make such property subject to the disposition of the settlor by will, or to be dealt with under the Statute of Distributions ; *per* Lord Truro, C., *Mackenzie v. Mackenzie*, 3 Mac. & Gor. 559.

Where trust funds were settled to the separate use of a married woman for her life, and after her death upon trust for such persons as she should appoint by will, and in default of appointment for her executors or administrators, she (having become a widow) applied for a transfer of the funds to herself and her assignees, offer-

ing to release her power of appointment. *Held*, that she was absolutely entitled to the trust funds: *Page v. Soper*, 11 Ha. 821.

See also *Daniel v. Dudley*, 1 Phil. 1; on app. from 11 Sim. 163; *Allen v. Thorp*, 7 Beav. 72; *Collier v. Squire*, 3 Russ. 467; *Hames v. Hames*, 2 Keen, 646; *Holloway v. Clarkson*, 2 Ha. 521; *Att.-Gen. v. Malkin*, 2 Phil. 64; *Re Seymour's Trusts*, Johns. 472; *Avern v. Lloyd*, L. R. 5 Eq. 383 (a will case); *Horseman v. Abbey*, 1 Ja. & W. 381.

But the context may show that "executors or administrators" means "next of kin."

"Executors or administrators of her own family."

Where in a marriage settlement the ultimate trust of the wife's fortune was "for her executors or administrators of her own family," and of the husband's fortune "for his executors or administrators of his own family," it was held that in the wife's case this meant her next of kin at her death, and in the husband's case his executors or administrators only: *Smith v. Dudley*, 9 Sim. 125 (but see the dictum of Cottenham, C., *Daniel v. Dudley*, 1 Phill. at p. 6).

"Executors, administrators, and assigns."

"Executors, administrators, and assigns" cannot mean next of kin; *per* Langdale, M. R., *Grafftey v. Humpage*, 1 Beav. at p. 52. (Why not?)

"Executors" take for benefit of their testator's estate.

Rule 125.—Any interest taken by the executors or administrators of A., under a trust for "A., his executors or administrators," or "the executors or administrators of A.," is taken by them as part of A.'s estate: *Collier v. Squire*, 3 Russ. 467; *Howell v. Gayler*, 5 Beav. 157; *Morris v. Howes*, 4 Ha. 599; *Daniel v. Dudley*, 1 Phil. 1; *Wellman v. Bowring*, 3 Sim. 328.

The construction is not altered by the addition of the words "for their own use and benefit:"

Hames v. Hames, 2 Keen, 646; *Meryon v. Collett*, 8 Beav. 386; S. C., 14 L. J. N. S. Ch. 369.

"It is extremely improbable that the settlor, executing a marriage settlement, and professing that his object was to make a provision for his intended wife, and the issue of the marriage, should silently intend to make a provision for the person who should chance to be his administrator—perhaps a small creditor—perhaps a person to whom administration might be granted *durante minori ætate*, or upon some other contingency; and unless the words are incapable of any other construction, and the Court is absolutely compelled, by force of them, to impute that highly improbable intention, that conclusion ought not to be adopted;" *Hames v. Hames*, 2 Keen, 650; S. C., 7 L. J. N. S. Ch. 123. "I think it probable that the object was to use words making it clear to the trustees that they might safely transfer the whole fund to his executors and administrators, and he thereupon relieved them from their trust; that the fund was to be disposed of by the executors or administrators without the trustees being under the necessity of looking to its application; and that the words were not used for the purpose of placing the money in the hands of an executor or administrator for his own personal enjoyment, but for the purpose of enabling him to make a proper application of it, without the interference of the trustees. As far as the trustees were concerned, it was to be the absolute property of the legal personal representatives;" *per* Lord Langdale, M. R., *Meryon v. Collett*, 8 Beav. 394. See also *Marshall v. Collett*, 1 Y. & C. Exch. 232.

Covenant in lease of land by lessor with the lessee, "his executors, administrators, and assigns," that if the lessee, his *executors, administrators, or assigns*, should at any time thereafter be desirous of purchasing the fee simple of the demised land, and should give notice in writing to the lessor, his heirs, and assigns, then the lessor, his heirs, and assigns would accept a named sum for the purchase of the fee simple, and on receipt thereof

would convey the fee simple to the lessee, *his heirs or assigns*, or as he or they should direct. *Held*, that the option to purchase was attached to the lease and passed with it; that on the death of the lessee intestate it consequently passed with the lessee's personal estate to his administrator, and that the administrator could not make a good title of the fee simple, which he had purchased under the option, without the concurrence of the statutory next of kin of the lessee: *Re Adams* and *The Kensington Vestry*, 24 Ch. D. 199; affirmed 32 W. R. 883.

Personal
representa-
tives.

Rule 126.—A trust of personalty for the “personal representatives” of A. is a trust for his executors or administrators in their representative character.

“I take it to be clear that I must construe the words ‘such person or persons as shall be her personal representative or representatives’ according to their ordinary meaning, and that ordinary meaning is ‘executors and administrators:’ that the words being in a marriage settlement, as distinguished from a will, are not to be taken as having other than their ordinary meaning, unless there is something in the context to give them a different meaning. The question, then, is whether, upon the construction of this particular instrument, the words have any other than their ordinary meaning;” *per Hall, V.-C., Best’s Settlement Trusts*, L. R. 18 Eq. 691. See also *Chapman v. Chapman*, 33 Beav. 556; *Dixon v. Dixon*, 24 Beav. 129; *Re Henderson*, 28 Beav. 656; *Re Wyndham’s Trusts*, L. R. 1 Eq. 290; *Alger v. Parrott*, L. R. 3 Eq. 328; all cases of wills.

Next of kin
held entitled
on context.

But the context may readily show that “personal representatives” means next of kin.

The next of kin were held entitled in *Robinson v. Evans*, 22 W. R. 199; S. C., 43 L. J. Ch. 82, where the

words were "in trust for the person or persons who should happen to be the legal personal representatives of A. at the time of her death;" in *Briggs v. Upton*, L. R. 7 Ch. 376, where the words were "pay to legal representatives in a due course of administration" (in both of which cases the words "executors and administrators" were used in other parts of the deed); and in *Wilson v. Pilkington*, 11 Jur. 537; S. C., 16 L. J. N. S. Ch. 169, where there was a trust for "the personal representatives in a legal course of administration."

"Next of kin or personal representative of A. in a due course of administration according to the Statute of Distributions," means the statutory next of kin to the exclusion of the widow of A.: *Kilner v. Leech*, 10 Bea. 362.

As to the meaning of "legal representatives," see *Topping v. Howard*, 4 De G. & Sm. 268; "next of kin or personal representative," see *Bailey v. Wright*, 18 Ves. 49; S. C., 1 Swanst. 39; "next personal representatives," see *Stockdale v. Nicholson*, L. R. 4 Eq. 359; and that "representatives" applied to real estate means the heirs, see the dictum of Romilly, M. R., in *Chapman v. Chapman*, 38 Beav. 556; as to "representatives," meaning the persons who take under the Statutes by representation, see *Lindsay v. Ellicott*, 46 L. J. Ch. 878.

As to gifts by will to "representatives," &c., see *Hawkins*, 106, *et seq.*

Miscellaneous.

As to gifts, independent or substitutional, of personalty to the "heirs" of A., see *ante*, Ch. XVII., Rules 94 and 95, p. 257; to the "heirs of the body" of A., *ibid.*, pp. 260, 262.

Realty limited to A. and his executors; see 1 Preston, Estates 30, where he says, "a limitation extending a grant to the *executors*, will not in any deed enlarge the estate; the estate will be of the same quantity, notwithstanding the executors are named, as it would have been in case no mention had been made of them." See *Re Bird*, 3 Ch. D. 214.

Legal
representa-
tives.

"Representa-
tives" applied
to realty.

Gift of
personalty to
"heirs."

Of realty to
"A. and his
executors,"
&c.

CHAPTER XXIII.

ISSUE (a). CHILDREN. MARRIAGE.

“Issue” and “children” always words of purchase :
“Issue” meaning of: cut down to children by context: “Children,” meaning of: may mean Grand-children, &c.: Trust for children “living at” a particular time includes a child en ventre at that time: “To be born” or “begotten”: “Children” *primâ facie* means legitimate Children: Meaning of “legitimate”: “Children” may mean illegitimate children: Gift to unborn illegitimate Children: Illegitimate Child en ventre: Gift to “A. and his issue”: “Marriage”: “Under Coverture”: Death “unmarried,” or “without having been married.”

“Issue,”
“child,” &c.,
always word
of purchase.

Rule 127.—In a deed “issue,” “child,” or “children,” are always words of purchase.

If a man give lands or tenements to a man *et semini suo*, or *exitibus vel prolibus de corpore suo*, to a man and to his seed, or to the issues or children of his body, he hath but an estate for life; for albeit that the statute provideth that *voluntas donatoris secundum formam in charta doni sui manifeste expressam de cætero observetur*, yet that will and intent must agree with the rules of law, and of this opinion was our author himself, as it appeareth in his learned reading on this statute, where he holdeth, if a man giveth land to a man *et exitibus de corpore suo legitime procreandis* or *semini suo* he hath but an estate

for life for that there wanteth words of inheritance; Co. Lit. 20b.

"The word 'issue' in a will may be a word of limitation, but in a deed is always a word of purchase;" *per* Hardwicke, C., *Bagshawe v. Spencer*, 2 At. 582; *per* Kenyon, C. J., *Doe v. Collis*, 4 T. R. 299.

"'First issue male' are words of purchase;" *Lewis Bowles' Case*, 11 Rep. 79b; S. C. Tud. L. C. R. P.

"Issue male," would necessarily take by purchase; *per* Sugden, C., *Rochfort v. Fitzmaurice*, 2 Dr. & War. at p. 17.

The reason for the rule is stated as follows in 2 Fearn, C. R. 249, s. 509 :—

"In a deed no word except the word 'heirs' will pass an estate of inheritance, and hence the word 'issue' cannot there be a word of limitation. It is therefore a word of purchase in this case, because that is the only construction by which it can become operative, not because it is aptly a word of purchase."

Example.—Lease for three lives to A., her executors, &c. A. assigned to a trustee, to the use of B. for life, and afterwards of his issue, and for want of such issue, over; B. died leaving a son and a daughter. *Held*, that they took as joint tenants for life: *Williams v. Jekyl*, 2 Ves. sen. 681.

As to the construction of "issue" in marriage articles, see *post*, Chapter on "MARRIAGE ARTICLES."

It follows that a limitation of real estate to "issue" gives life estates only: *Rochfort v. Fitzmaurice*, 2 Dr. & War. at p. 17; *Barron v. Barron*, 8 Ir. C. R. 366; *Fitzherbert v. Heathcote*, cited in *Bayley v. Morris*, 4 Ves. 794.

Limitation to "issue" gives life estates only.

A limitation of realty to "A. and his issue," there being no issue alive at the date of the deed, gives a life estate to A., and the issue take nothing, even if the limitation is in remainder, and issue are born before it takes effect;

Makepiece v. Fletcher, 2 Com. Rep. 457; *Wheeler v. Duke*, 1 Cr. & Mee. 210; *Dawson v. Dawson*, 18 Ir. L. R. 472.

Personalty.

We have not been able to find a case of an immediate gift by deed of personalty to "A. and his issue," but it is probable that if there were no issue in existence, A. would take, and if there were issue in existence, A. and the issue then living would take jointly. That the issue take *per capita*, see *Leigh v. Norbury*, *post*, 321, and jointly, *Davenport v. Hanbury*, 3 Ves. 257.

Issue.

"Issue."

Rule 128.—The word 'issue,' occurring in a deed, *primâ facie* means *descendants*; but the context may shew that it means *children*.

"The word 'Issue' is an ambiguous word. In the ordinary parlance of laymen it means children, and only children. When you talk of what issue a man has, or what issue there has been of a marriage, you mean children, not grandchildren, or great grandchildren. But in the language of lawyers, and only in that language, it means 'descendants'"; *per James, L. J., Ralph v. Carrick*, 11 Ch. D. 883. See also *per Jessel, M. R., Morgan v. Thomas*, 9 Q. B. D. at p. 646.

"It is clearly settled that the word 'issue,' unconfined by any indication of intention, includes all descendants. Intention is required for the purpose of limiting the sense of that word, restraining it to children only;" *per Grant, M. R., Leigh v. Norbury*, 13 Ves. 344.

"The law I take to be that 'issue' *primâ facie*, means all descendants; but the word may, by the context, . . . get the meaning of 'children' and be so limited. The onus of proving that the word is used in that restricted sense lies upon those who assert that construction;" *per Sullivan, M. R. (Ir.), Denis' Trusts*, Ir. Rep. 10 Eq. 86.

"Issue"
meaning
descendants.

Examples. "Issue" meaning "descendants."—Voluntary settlement of real estate on the settlor for life, remainder to his nephew John for life: remainder to his

sons successively in tail male ; remainder to four persons (three of whom were the testator's sisters, and the fourth was his niece), and their heirs, on trust that they or the survivor, or heir of such survivor, should sell the premises ; and that the money raised thereby might be equally divided between the four persons, or the respective issues of their bodies, in case they, or any of them, should be dead at the time of such failure of issue male of John, share and share alike, viz., to each of them, or their respective children, one fourth part thereof ; provided that if any of them should be dead without issue, when there should be such a failure of issue of John, then to be equally divided among the survivors or their respective children, in case any of them also should be dead, leaving issue of their bodies. John died without issue. At the time of his death none of the four persons named in the will were living. The niece had died without issue. Of one of the sisters there were children living ; of another, children and great grandchildren ; of the third, only grandchildren. The contention was that the use of the word " children " restricted the meaning of the word " issue." But Lord Hardwicke came to the conclusion that, having regard to the fact that the testator must have contemplated that the ultimate trust might take effect after a long lapse of years, when it was more probable that grandchildren and great grandchildren would be living than children, the word " issue " must be construed strictly as including the grandchildren and great grandchildren ; *Wyth v. Blackman*, 1 Ves. sen. 196 ; S. C. *sub nom. Wythe v. Thurlston*, Amb. 555. See observations on this case, 3 Ves. 257.

Settlement on marriage of personalty on husband for life, remainder (subject to payment of an annuity to the wife) to such persons as the husband should by deed or will appoint ; in default, for his issue. He had no children by the marriage, but he had children and grandchildren by a former marriage. *Held*, that the children by that marriage, all of whom survived him, and the grandchildren living at his death were

entitled equally *per capita*; *Leigh v. Norbury*, 18 Ves. 340.

J., by a voluntary settlement, "in order to make some provision for his daughter, M., the wife of T., and for her issue by T." gave property on trust for M. for life, "and upon the decease of M., leaving issue by T., upon trust for such issue respectively;" M. had issue by T., one daughter only, who died in M.'s lifetime leaving children. *Held*, that such children were entitled as "issue"; *South v. Searle*, 4 W. R. 470.

Bond given on marriage for payment to the husband within a limited time after the obligor's death, "if any of the issue of the marriage should be living at that time." The children of the marriage all died before the obligor, leaving grandchildren who were living at the time appointed for payment. *Held*, that the grandchildren were "issue" within the meaning of the bond: *Haydon v. Wilshire*, 3 T. R. 372.

Where there was a power of appointment between the brothers and sisters "who shall be then living, and the issue of any one or more of them as shall be then dead, leaving issue," with a gift in default of appointment to the same persons "equally to be divided among them as tenants in common, the issue of any deceased brother or sister to take only such share as such brother or sister would have taken in case he or she was then living, and the children of each deceased brother and sister, if more than one, to take in equal shares as tenants in common between themselves." *Held*, that "issue" was not confined to children: *Harrison v. Symons*, 14 W. R. 959.

Post-nuptial settlement of personalty, made in pursuance of ante-nuptial agreement, on trust (subject to life interests to husband and wife), for "the issue of the marriage" as the wife should appoint; in default, as the husband should appoint: in default, for "the child or children of the marriage equally among them, and the issue of any of them who may have died leaving lawful issue, the whole issue of any one so dying receiving the

share that would have belonged to their deceased parent." Held, that "issue" was to be taken in its proper sense: *Donoghue v. Brooke*, Ir. R. 9 Eq. 489.

See also *Re Howard's Trusts*, 7 Ir. Ch. R. 344.

It is difficult to lay down any rule as to what words will cut down the meaning of "issue" to "children;" although slight indications of intention in marriage articles (a) or a will suffice to show that "issue" is to be construed "children," this is not the case in a marriage settlement.

"The Court has often laid it down that marriage articles are to be treated only as a memorandum of intentions, which are to be carried out in such a way as to effect the intention of the parties. But the Court never deals in that way with an executed settlement: it always takes such an instrument as it finds it. With regard to wills the Court always looks at the intention of the testator, and adopts in practice, if not in theory, a much more benignant rule of construction;" *per* Pearson, J., *Re Warren's Trusts*, 26 Ch. D. at p. 217.

The only dictum that we have been able to find to the contrary is in *Re Dixon's Trusts*, Ir. R. 4 Eq. 12, where Christian, L. J., says, "When a testator, by his will makes a gift or a limitation to the issue of another, there is nothing in the nature of the occasion of itself to suggest any restriction upon the presumptively indefinite signification of the word issue. But the reverse is the case when the instrument is a marriage settlement (which the recitals in this deed show that, though executed after marriage, it was in effect); for there the occasion itself, the very business in hand, suggests that 'issue' is used as a synonym for children. Why? Because the proper objects of a marriage settlement are the children of the intended marriage. Grandchildren or great-grandchildren

(a) See *post*, Chapter on MARRIAGE ARTICLES.

are never thought of on such occasions, as objects of independent provision; portions are provided for the children, and they are thereby enabled, when their own turn comes to be married, to make provision for their children. But issue more remote than children are rarely, if ever, directly within the scope of a marriage treaty; and therefore it is that, in dealing with such an instrument, the very occasion suggests that if 'issue' be the word used, it is meant in the sense, to which it so easily lends itself, of 'children.' Thus the very nature of the instrument helps to construe the word. Another clue is this—the constant association with 'issue' of the words 'of the marriage' or 'of him.' Thus, in the recitals, it is 'to make a provision for the said Anne, and the present and future issue of the said Anne, by him, the said Thomas William,' and again, 'in order to make a provision for the said Anne and the issue of said marriage'—and in the limitations themselves, the same form of expression is twice repeated, 'to and amongst the present and future issue of the said marriage.' Now, what is the force of those associated words? Plainly, to my mind, to particularize the sense of the word 'issue' to that of the immediate offspring of that particular marriage—the issue of the union of these two individuals, and not the issue of any other union; in other words, the children of these two."

Examples. "Issue" restricted to "Children."—Where a marriage settlement recited an intention to provide for "the issue of the said intended marriage," and the trusts, after the deaths of the husband and wife, were for the "issue of the said marriage" as the husband should appoint, and in default of appointment, for "such issue" equally; but if there should be no "issue" of said intended marriage, or in case all such "issue" should die under twenty-one or before marrying, then in trust for the survivor of the husband and wife, it was held that "issue" meant "children;" *Re Denis*, Ir. R. 10 Eq. 81.

By marriage settlement a fund was settled (after the

death of the survivor of the husband and wife) in trust for "the children then living," to be paid at twenty-one ; and in case both the husband and wife should die "*without leaving any lawful issue*," then as the husband should appoint, and in default of appointment, "in case there should be no child or children as aforesaid," over. The children of the marriage all died in the lifetime of the husband and wife, leaving children who survived their grandparents. *Held*, that the gift over took effect : *Re Heath*, 28 Beav. 198.

A settlement of personalty contained trusts for the children as tenants in common, "the share or shares of such of the said children as shall be a son or sons to be considered as a vested and transmissible interest at his or their respective age or ages of twenty-one years, or dying under that age leaving lawful *issue* of his or their body or bodies lawfully begotten, living at his or their death or respective deaths, and of such of them as shall be a daughter or daughters at her or their like age or ages, or day or days of marriage, respectively, which shall first happen ;" and a covenant for the settlement of the after-acquired property of the wife upon trust for her for life, and afterwards "for all and every *the issue* of the marriage upon the same trusts," with a gift over in case no *child* or *children* should attain vested interests, &c. *Held*, that the word "issue" in the covenant meant "children" : *Marshall v. Baker*, 31 Beav. 608.

By marriage settlement, a fund was settled in trust after the deaths of the husband and wife for the issue as the husband should appoint, and if there should be only one child living at the death of the survivor of the husband and wife, then in trust for such one child, with a gift over, if there should be no issue of the marriage living at the death of the husband. *Held*, that "issue" meant "children" : *Re Meade's Trusts*, 7 L. R. Ir. 51.

Lease for lives to A., her executors, &c. A. assigns for value to the use of B. for life, and afterwards to the use of his issue lawfully begotten, and for want of such

issue over. *Held*, that "issue meant children": *Williams v. Jekyl*, 2 Ves. sen. 681.

"Male issue" meaning "sons."

Limitation in a voluntary settlement to the use of A. for life, remainder to the use of "the first male issue lawfully begotten by A. which should attain the age of twenty-one years, and to the heirs and assigns of such male issue for ever." *Held*, that "male issue" meant sons (stress was laid on the words "begotten by A.," and there were other expressions which helped this construction): *Hampson v. Brandwood*, 1 Mad. 981, see p. 388.

In a limitation to A. for life, remainder, after his decease, to his "issue male, and for want of such issue," to A. in fee, the words "issue male" were construed "sons": *Fitzherbert v. Heathcote*, cited 4 Ves. 794.

"Issues females."

Limitation in remainder to the "issues females," of their bodies. *Held*, that daughters were meant: *Earl of Sussex v. Temple*, 1 Ld. Ray. 810.

"Issue" restricted to children by reference to parent.

Sometimes a reference to the "parent" of issue will suffice to show that "issue" means "children;" see Hawkins on Wills, 88, and 2 Jarm. on Wills, 103.

Examples.—Trust in remainder for twelve named persons, described as the children of A., or such of them as should be alive at a certain time, "and the issue of such of them as might be then dead leaving issue, to be equally divided between them, share and share alike, but so as the issue of any deceased child should take between them no more than the parent would have taken if then living." *Held*, that "issue" meant children: *Anderson v. St. Vincent*, 4 W. R. 304; S. C., 2 Jur. N. S. 607.

By deed trusts of a fund were declared for the children of a marriage living at the death of the husband and wife, with a provision that if any should die in the lifetime of the husband and wife leaving issue, such issue should take such share as their parent would have been entitled to, in case he or she had survived the husband

and wife. *Held*, that a grandchild of a child of the marriage was excluded: *Harrington v. Lawrence*, cited 11 Sim. 188. See, to the same effect, *Tatham v. Vernon*, 29 Beav. 604. See also *Barracrough v. Shillito*, 28 S. J. 636; W. N. 1884, 158; 32 W. R. 875; 53 L. J. Ch. 841.

See the cases on wills collected, 2 Jarman (4th edit.), 108.

If "issue" is evidently used in one clause of a settlement as meaning "children," it does not necessarily follow that it is used in the same meaning in every clause: *Re Warren's Trusts*, 26 Ch. D. 208; *Re Biron*, 1 L. R. Ir. 258.

"Issue" restricted to children in one clause only.

"Children."

The primary meaning of the word "children" is descendants of the first degree: but it is sometimes used in the secondary meaning of "issue," as in the phrase "the Children of Israel;" or in the meaning of some class of issue, as grandchildren or great grandchildren. See *Wythe v. Thurlston*, Amb. 555; better reported, *sub nom. Wyth v. Blackman*, 1 Ves. sen. 196. See also *Berry v. Berry*, 3 Gif. 134; and 2 Jarman on Wills, 147. But consider the remarks of Jessel, M. R., *Morgan v. Thomas*, 9 Q. B. D. at 646.

"Children" meaning of.

"Children of the wife," in a marriage settlement of the husband's property, means children of the wife by that husband: *Dafforne v. Goodman*, 2 Vern. 362. "Younger children" in a settlement made not in contemplation of marriage by a widower, who afterwards marries, includes his children by the second as well as the first wife: *Brathwaite v. Brathwaite*, 1 Vern. 334. See, *post*, Chap. XXIV.

Rule 129.—A gift to, or trust for, children born or living at a given time, includes a child *en ventre* at that time and born afterwards: *Beale v. Beale*, 1 P. W. 244.

"Children" includes child *en ventre*.

The cases on wills may be found in Hawkins on Wills, p. 79. Consider *Re Farncombe's Trusts*, 9 Ch. D. 652, where, on the construction of a will, a child *en ventre*, but not born, at the date of an appointment made under a power in the will, did not take.

Palmer v. Cracroft, 2 Vern. 578, where a posthumous son was excluded by the next heir, seems to have been a case, as to one branch of it, not on the construction or the deed, but determining that the contingent remainder to the child could not take effect owing to its becoming unsupported on the father's death; and as to the other branch, it was decided as a case of hardship. In *Millar v. Turner*, 1 Ves. sen. 85, where by marriage articles provision was made for "such child or children of the marriage as should be living at the death of the father or mother," a posthumous child was allowed to take its share.

10 & 11 W. 3,
c. 16.

The question was formerly considered doubtful, and an Act was passed, 10 & 11 W. 3, c. 16, by which it is enacted that where an estate is settled in remainder on children, with remainder over, a posthumous child may take as if it had been born in its father's lifetime.

"To be born
&c." (b).

Rule 130.—Gifts to, or trusts for, children "*to be born*," or "*to be begotten*," include those already born or begotten; and *e contra*.

"The words 'begotten and to be begotten' are the same, as well upon the construction of wills as settlements, and take in all the issue after begotten:" *Cook v. Cook*, 2 Vern. 544. See *Almack v. Horn*, 1 H. & M. 680; *Doe d. James v. Hallett*, 1 M. & S. 121, will cases.

Husband and wife, having issue a daughter, settled £600 in trust for the wife for life, remainder in trust for "such daughter or daughters as *shall* be begotten by the husband on the wife." The wife died without having

(b) As to "heirs to be begotten" taking by descent, see *ante*, p. 236; *Frederick v. Frederick*, Cro. El. 334, must be considered as overruled.

had any other daughter. *Held*, that the daughter already born should take: *Hewet v. Ireland*, 1 P. Wms. 426; S. C. 2 Eq. Ca. Ab. 189, pl. 9; Pre. Ch. 490. This appears to be the case reported in 10 Mod. 398, *sub nom. Slingsby v. —*.

There is no distinction between "born" and "to be born:" see the cases on wills, Hawkins, 70; 2 Jarman, 188.

If the words are "born or to be born," they will, if possible, be construed so as all to have their full effect: *Gabb v. Prendergast*, 1 K. & J. 439.

Illegitimate Children.

The primary meaning of the word "children" is legitimate children, though it is sometimes used in the secondary meaning of illegitimate children: it follows, (Rule 10) that:

Rule 131.—"Children" must be taken to mean "Children" legitimate children, unless that meaning is excluded *prima facie* means legitimate children (c). by the circumstances or the context: *Williamson v. Adams*, 1 Ves. & B. at p. 462; *Hill v. Crook*, L. R. 6 H. L. 265; *Megson v. Hindle*, 15 Ch. D. 198; *Dorin v. Dorin*, L. R. 7 H. L. 568.

Observation.—By "legitimate children" in the rule are meant:—

First. Children born in wedlock.

Secondly. Children born out of wedlock of persons who afterwards marry and acknowledge the children, and who, at the time of the birth of the children and of the marriage, are domiciled in a place where children born before marriage are rendered legitimate by the subsequent marriage of the parents

(c) Most of the cases on this rule are cases on wills.

and acknowledgment of the children by them : *Re Andros*, 24 Ch. D. 637 ; *Re Goodman's Trusts*, 17 Ch. D. 266 (where all the authorities are cited), over-ruling *Boyes v. Bedale*, 1 H. & M. 798.

The cases collected in 2 Jarman on Wills, 217 *et seq.* (all of which, except *Blodwell v. Edwards*, Cro. El. 509, S. C. Noy, 85 ; Moo. 480, cited Co. Lit. 3b, and *Gabb v. Prendergast*, 1 K. & J. 489, are cases on the construction of wills) lead to the following conclusions :—

First. Illegitimate children are admitted to take under a gift to “ children ” where they have acquired that name by reputation (as in *Hill v. Crook*, L. R. 6 H. L. 265), and the context shows that they were intended ; or where some qualification is added to the word “ children ” which excludes the legitimate children, as where the gift was to the children “ now living ” of a testator, who died a bachelor ; *Blundell v. Dunn*, 1 Mad. 488 ; or “ as well those already born as hereafter to be born ” of a person who had only illegitimate children at the date of the deed and had no children legitimate or illegitimate afterwards ; *Gabb v. Prendergast*, 1 K. & J. 489 ; and where the gift was for payment of income to A. for life or till marriage, for the maintenance of herself and her children B. & C., and after her death or marriage for her children, and it was held that B. and C., who were illegitimate, took as “ children ; ” *Re Connor*, 2 J. & Lat. 456 : and where a spinster made a bequest to her “ children ; ” *Clifton v. Goodbun*, L. R. 6 Eq. 278.

Second. Illegitimate children may take concurrently with legitimate children if the terms of the gift cannot be satisfied without their doing so : *Evans v. Davies*, 7 Hare, 498 ; *Hartley v. Tribber*, 16 Beav. 510 ; *Meredith v. Farr*, 2 Y. & C. C. C. 525 ; *Hibbert v. Hibbert*, L. R. 15 Eq. 372 ; *Gabb v. Prendergast*, 1 K. & J. 489 ; *Barnett v. Tugwell*, 31 Beav. 232 ; *Re Humphries*, 24 Ch. D. 691.

Third. Illegitimate children can take by the name that they have acquired by reputation at the time when the

deed is executed: *Wilkinson v. Adam*, 1 V. & B. 422 ; S. C. in Dom. Proc. 12 Pri. 470.

Observation.—It appears that, where the word “children” is applied to the offspring of a person who is not domiciled in a Christian country, it may readily be extended to illegitimate children; *Barlow v. Orde*, L. R. 3 P. C. 165.

Children of person domiciled in heathen country.

It is a rule of law that :

Rule 132.—No gift to an illegitimate child unborn at the date of the deed can take effect: Co. Lit. 3*b*; *Pratt v. Mathew*, 22 Beav. 328; *Medworth v. Pope*, 27 Beav. 71; *Occleston v. Fullalove*, L. R. 9 Ch. 147.

Gift to unborn illegitimate child.

Exception.—A gift to an illegitimate child *en ventre*, not describing it as being by a particular father, is good; *Gordon v. Gordon*, 1 Mer. 141; but there is some doubt if the child can take if it be described as being by a particular father: *Earle v. Wilson*, 17 Ves. 528; *Evans v. Massey*, 8 Pri. 22.

Marriage.

Rule 133.—“Marriage” means a valid and effectual marriage, and “solemnized” means validly and effectually solemnized.

Marriage.

Examples.—An agreement was entered into “in consideration of the intended marriage between A. and B.,” for the settlement of the lady’s real estate. The marriage ceremony was performed. A conveyance was made in pursuance of the agreement, and then it was discovered, before any issue were born, that the marriage was invalid. A. and B. executed deeds purporting to revoke the prior agreement and conveyance. They then executed a new settle-

ment, and afterwards were validly married. *Held*, that, although the legal estate passed by the first settlement (*Boughton v. Sandilands*, 3 Taunt. 342), a court of equity would not hold the parties bound by it, since it was founded on the misapprehension of the parties, who believed that they were validly married: *Robinson v. Dickenson*, 3 Rus. 399.

A post-nuptial settlement made by a man and woman who had gone through the ceremony of marriage, in which she was described as his wife, was set aside at the instance of the woman, on the ground of total failure of consideration, the marriage having been proved to be invalid: *Coulson v. Alison*, 2 Gif. 279; S. C., 2 De G. F. & J. 521.

Where a man went through the ceremony of marriage with his deceased wife's sister, and prior thereto made a settlement in consideration of the intended marriage, and declared a trust of the settled property in favour of himself till the solemnization of the marriage, it was held that, inasmuch as the marriage could not be legally solemnized, the trust for him was absolute: *Chapman v. Bradley*, 33 Beav. 61; S. C., 4 De G. J. & S. 72; *Pawson v. Brown*, 13 Ch. D. 202.

Divorce.

It should perhaps be observed that where a settlement purports to be made in consideration of marriage, this means the then intended marriage, so that, in case of divorce at a time when there is no issue, the ultimate trusts arise, notwithstanding the possibility of the parties marrying again and having issue: *Bond v. Taylor*, 2 J. & H. 473.

Marriage not solemnized.

Where the marriage was not solemnized, but the parties cohabited and issue was born, it was held that the contract for the marriage mentioned in the settlement was entirely put an end to, and that the property of the intended wife which had been vested in the trustees of the settlement must be re-transferred to her: *Essery v. Cowlard*, 26 Ch. D. 191; S. C., 32 W. R. 518.

Under Coverture.

Where a power was vested by a marriage settlement in the intended wife, exerciseable "at any time or times hereafter during the coverture." *Held*, that it could not be exercised after the husband's death: *Morris v. Howes*, 4 Hare, 599; *Horseman v. Abbey*, 1 Jac. & Wal. 381. "Under coverture" (a).

Death "unmarried," or "without having been married."

Rule 134.—"Unmarried" is a word of flexible meaning, to be construed with reference to the plain intention of the instrument in which it is used. "Un-married."

"What is the meaning of the word 'unmarried'? It may, without any violence to language, mean either 'without ever having been married,' or 'not having a husband living at her death;'" *per* Lord Cranworth, *Clarke v. Colls*, 9 H. L. C. 612. "The word 'unmarried' . . . is no doubt capable of two different constructions; it may mean either 'never having been married,' or 'not being married,' that is, 'being a widow' at the time of her death, which would exclude the marital right of the husband. The context (b) must determine in every case in what sense the word was used;" *per* Lord Wensleydale, *ib.* 615; see *Dalrymple v. Hall*, 16 Ch. D. 715, a case on the construction of a will.

"Where a legacy is given by will to a daughter who, at the date of the will, has never been married, and the gift is made to be conditional upon the legatee being 'unmarried' at a given time, there it may well be that the testator is looking to the then condition and status of the legatee as a person who has never been married, and foreseeing the circumstances in which she will stand

(a) As to the nature of the interest taken by a wife under a trust for her during coverture, see *ante*, p. 294.

(b) Or the circumstances, *e.gr.*, that the instrument is a marriage settlement.

If that status and condition continue, and intends the bequest to be conditional upon her continuing in that status or condition. In such a case, the word 'unmarried' would rightly be construed to mean, 'a spinster' and not 'a widow.' On the other hand, in a settlement, where property has been settled, in the event of the wife dying in the lifetime of her husband, upon trust for the persons who at her death would have been entitled to her personal estate in case she had died intestate and 'unmarried,' or 'without being married,' there being no provision for the children who eventually survive her, it is clear that the motive is, not to prevent her marrying again in the event of her surviving her husband, but simply to exclude her husband, in the event of his proving the survivor, from claiming any part of her personal estate. In such a case, the expressions 'unmarried' or 'without being married' would be held to mean 'without having a husband at the time of her death,' not 'without ever having had a husband'—'a widow' and not 'a spinster;' and children surviving their mother would be entitled;" *per* Wood, V.-C., *Re Saunders*, 3 K. & J. 156. This distinction is well illustrated in the case of *Pratt v. Mathew*, 8 De G. M. & G. 522, where the word "unmarried" was used twice in the settlement: first, for the purpose only of stating the converse case to that of a daughter marrying during minority; secondly, for the purpose only of designating the converse case to that of a woman dying having a husband, and there it was understood as referring to the case of her dying not having a husband.

In a will "unmarried" will, in the absence of a context, be construed "not having been married"; *per* Pearson, J., *Re Sergeant*, 26 Ch. D. 575.

Death
"intestate and
unmarried."

Rule 135.—A gift in a marriage settlement to the next of kin, or statutory next of kin of the wife, "as if she had died intestate and unmarried," will be construed to mean as if she had died intestate and

a widow; *Re Saunders' Trust*, 3 K. & J. 152; *Pratt v. Mathew*, 8 De G. M. & G. 523.

"If the former construction" (*sc.*, that "unmarried" means "without ever having been married") "be adopted, then if the wife should survive her husband, and afterwards marry and have children, her collateral relatives would take the fund to the exclusion of her own issue. If the latter construction" (*sc.*, "not having a husband living at her death") "be adopted, no such results will follow. This seems to me to be conclusive. It is impossible to suppose that the framers of the settlement intended to use the word in a sense which would exclude the possible issue of the wife in favour of her collateral relatives;" *per* Lord Cranworth, *Clarke v. Colls*, 9 H. L. C. 612.

The words "without being married" bear the same construction: *Re Norman*, 3 De G. M. & G. 965. "Without being married."

Rule 136.—The death of a woman "without having been married" means "without ever having had a husband": *Emmins v. Bradford*, 13 Ch. D. 493. Without having been married.

It should perhaps be stated that in *Emmins v. Bradford*, Jessel, M. R., declined to follow the decisions of Fry, J., in *Re Ball*, 11 Ch. D. 270, and *Upton v. Brown*, 12 Ch. D. 872, on the ground that Fry, J., appeared to believe that he was bound by a rule laid down by the Lords Justices in *Wilson v. Atkinson*, 4 De G. J. & S. 455, while no such rule was in fact laid down.

The context may show that the rule does not apply. In *Wilson v. Atkinson*, 4 De G. J. & S. 455, on the marriage of a widow who had an illegitimate daughter, funds belonging to her were settled on trust for her for life for her separate use without anticipation, remainder as she should appoint, and in default, for her if she survived her husband, but if she died in his lifetime, then in trust Rule excluded by context.

for the persons who would have been entitled under the Statutes of Distribution if she had died intestate and without having been married; and it was declared that, for the purposes of that trust, the illegitimate daughter should be deemed her lawful child. *Held*, on the wife's death in the husband's lifetime, without lawful issue and without having made any appointment, that the illegitimate daughter was entitled.

CHAPTER XXIV.

ELDEST SON. YOUNGER CHILDREN.

Eldest child: Younger children: Younger child becoming eldest: In loco parentis: Where no estate limited to Eldest Child: Children "besides" or "other than" an eldest.

THE words "elder" or "younger" applied to individuals merely as living beings, without reference to property, office, title, or other like distinctions, must, of course, be taken to refer to the order of birth. So, in the limitation of an estate, "eldest son"; (*Bathurst v. Errington*, 2 App. Cas. 698; *Meredith v. Trefry*, 12 Ch. D. 170, both cases on wills): or "eldest child," or "senior puer," (*Lane v. Cowper*, Moo. 108, S. C., *sub nom. Lane v. Coups*, Ow. 64; S. C., *sub nom. Humfreston's Case*, Dy. 387a; where a daughter was older than a son) means a first born son or child. But the persons to whom they are applied may be placed in situations and under conditions which are irrespective of their ages, and render the words capable of other distinctions; and then the question arises whether, from the context in which the words are used, they are to be referred to the differences in age, or to those in the positions of the parties to whom they are applied. There are many familiar instances in which the primary meanings of the words are excluded when they are applied to persons with relation to their office or situation; as where one member of the bar is said to be "senior" or "junior" to another, a junior peer, a puisne judge, and the like.

The cases show that, on the one hand, where provisions are made by any person, whether *in loco parentis* or not, for "younger children," by an instrument that does not make provision, or does not refer to or is not shown by extrinsic evidence to be connected with provisions already made, for the "eldest" child, the words "younger" and "eldest" are used in their primary meaning, *i.e.*, in reference to order of birth; and that, on the other hand, where the provisions are made by a person *in loco parentis* for "younger children," by an instrument which makes provision, or refers to or is shown by extrinsic evidence to be connected with provisions made, for the "eldest child," the word "eldest" is used to designate the child who becomes entitled under the provisions made for the eldest, even though he may not be the eldest in order of birth.

"Eldest,"
meaning child
succeeding to
estate.

Rule 137.—In provisions made by a parent, or person *in loco parentis*, for younger children, by a deed which limits an estate to, or (*Ellison v. Thomas*, 1 De G. J. & S. 18,) refers to or is shown by extrinsic evidence to be connected with (a) an instrument limiting an estate to, the eldest child, the phrase "eldest child" means "child succeeding to the estate"; and "younger children" means "children not succeeding to the estate."

Time at which
eldest is ascer-
tained.

In this case the time at which the characters of eldest child and younger child are to be ascertained is the time at which the fund is to be distributed among the younger children, which may or may not be (though it generally is) the time at which the eldest succeeds to the estate.

"Younger
children"
includes

Observation.—The expression "younger children" of A. includes his children by a subsequent

(a) See observation, *post*, p. 349.

marriage; *Brathwaite v. Brathwaite*, 1 Vern. 334. children of subsequent marriages.
See also *Burrell v. Crutchley*, 15 Ves. at p. 555; *Butcher v. Butcher*, 1 V. & B. at 91; and *Green v. Green*, 2 Jo. & Lat. at 541; S. C., 8 Ir. Eq. R. 473.

“Every child except the heir is considered in equity as a younger; and eldership not carrying the estate along with it is considered not such an eldership as shall exclude by virtue of such clauses; and it would be hard that the right of eldership should be taken away, and yet not have the benefit of it as a younger child;” *per* Lord Hardwicke, C., *Duke v. Doidge*, 2 Ves. Sen. 208, note (cited by Wood, V.-C., in *Macoubrey v. Jones*, 2 K. & J. at 691).

“It is now well established law that where the bulk of an estate is settled in strict settlement, and by the same settlement portions are provided for younger children, no child taking the bulk of the estate by virtue of the limitations in strict settlement, shall take any benefit from the portions. And that is so, whether the settlement does or does not contain an express provision to exclude him from a share in such portions;” *per* Wood, V.-C., *Macoubrey v. Jones*, 2 K. & J. at p. 690; cited with approval by Lord Cairns in *Collingwood v. Stanhope*, L. R. 4 H. L. at p. 61.

In *Ellison v. Thomas*, 2 Dr. & Sm. 111; S. C., 1 De G. J. & S. 18; and *Re Bayley's Settlement*, L. R. 9 Eq. 491; S. C., L. R. 6 Ch. 590, the deed containing the provisions for younger children, referred to that containing the provisions for the eldest son; and though this was not the case in *Teynham v. Webb*, 2 Ves. Sen. 198, yet it was construed with reference to them; see pp. 202, 210.

“The principle of the cases relating to settlements is this, that the Court, with regard to all questions arising on provisions for children under a marriage settlement, holds that the principal intent to be imputed to the parties (however differently that intent may be expressed, so long

Elder child
not succeeding
to estate.

Period of
distribution.

as it is not contrary to what is actually found in the settlement), is a desire to provide equality for the children, that one child should not take a double portion, and that no child should be excluded. These seem to me to be the two beacons, or landmarks, by which the Court has directed itself in steering, sometimes, undoubtedly, a very difficult and doubtful course. That principle has led to this conclusion, that although it should be, in terms, said in the settlement that the elder child is not to have a portion, yet if under such a settlement the one who is really the elder child, the first born, does not take the family estate, it has been held that, the family estate going to a younger son (which I also ought, indeed, to have mentioned as a leading part of that same system of exposition), the Court of Chancery does not regard the elder born as the elder son, but regards the younger brother, who is in possession of the family estate, as the elder, and the actually elder brother as the younger, in order to introduce him as a younger brother into the benefits of the portions provided for the younger children. That being so, it has been farther held that the Court will not, notwithstanding very strong words (as there have been in some cases) in the settlement to the contrary, hold the portions to be indefeasibly vested in the children in such a manner as to allow, on the one hand, a double portion to be given to one child, or, on the other hand, to allow any child to be excluded. And therefore it has come to this conclusion, that the period for ascertaining what is the true construction of the settlement with reference to the distribution, or the portions provided for the children, is that period when the distribution itself is to take place. Then, looking round, and seeing all the events which have happened in the family, though you may find that one child has held the place of a younger child during the period that the settlement has been in existence, that is to say, subsequent to the marriage of the parents, and holding in such case that the younger child has become entitled to a portion, nay, even though that portion may have been assigned to him, yet

if, at the period of distribution, that child has become the elder child, then he is no longer entitled to a portion, and the portion which has been assigned to him is no longer his; he takes the family estate, and the rest of the children are let in as younger children to the benefit of the fund out of which the portions are to be provided, including that portion of the fund which had been assigned to him who has now become the elder child;” *per* Lord Hatherley, C., *Collingwood v. Stanhope*, L. R. 4 H. L. 52.

“ This case depends upon the enquiry at what time the words of exclusion of the eldest son for the time being come into operation; that is to say, at what time the eldest son for the time being is to be looked for and ascertained. . . . The persons entitled must be ascertained at the time when the money is directed to be raised and divided, and the words of exception appear to me to attach at that time upon the son who then answers the description, and to exclude him from the class of persons interested;” *per* Lord Westbury, C., *Ellison v. Thomas*, 1 De G. J. & S. 25. See also *Scarisbrick v. Skelmersdale*, 4 Y. & C. Ex. at p. 113, *per* Maule, J.; *Tennison v. Moore*, 13 Ir. Eq. R. 424.

Time at which
character fixed.

“ The period at which the rights of the parties are to be ascertained has been well and conclusively settled to be that at which the fund becomes distributable under the trusts;” *per* Bacon, V.-C., *Carter v. Earl of Ducie*, 41 L. J. N. S. Ch. 153, at p. 157; S. C., 20 W. R. 228.

It should perhaps be observed that the fact that, owing to a change in the value of the estate charged with the portions, the amount of the portions exceeds the value of the residue of the estate will not entitle a younger son becoming the eldest to claim a portion; *Reid v. Hoare*, 26 Ch. D. 363 (where the authorities on the general Rule are discussed by Kay, J.).

Where portions exceed whole value of the estate.

See on the rule 3 Dav. Prec. p. 411, *et seq.*, citing Mathews on Portions, pp. 13, *et seq.*; 2 Spence Eq. 410, *et seq.*; Peachey on Settlements, 446, *et seq.*

Examples.—(1) Younger child succeeding to the estate held not entitled to share in provisions for younger children.

A father on his marriage settled an estate on himself for life, with remainder to trustees after his death on trust to raise portions for his younger children, in such proportions as he should appoint, and in default equally, to be paid at their respective ages of twenty-one years with remainder to his first and other sons successively in tail. The father appointed a sum to his second son, who was of full age at the time, and afterwards on the death of the eldest son without issue, and without having barred his estate tail, appointed the whole of the portions fund among the other younger children: *Held*, that the second son took nothing under the first appointment. "At the time of the appointment he was a person capable to take, and was a younger child within the power of appointing: but this was a defeasible appointment, not from any power of revoking, or upon the words of the appointment, but from the capacity of the person. He was a person capable to take at the time of the appointment made, but that was *sub modo*, and upon a tacit or implied condition that he should not afterwards happen to become the eldest son and heir;" *per* Wright, L. K., *Chadwick v. Doleman*, 2 Vern. 528.

The branch of the rule by which a younger child becoming the eldest is excluded from the provision for younger children, was also applied in *Broadmead v. Wood*, 1 Br. C. C. 77 (where an appointment had been made *nominatim* to a younger child, who afterwards became the eldest, and where the power expressly excluded "the eldest son, or the son possessing the estate"): *Davies v. Huguenin*, 1 H. & M. 730; *Teynham v. Webb*, 2 Ves. Sen. 198 (where it does not appear from the report that any estate was settled on the eldest son, but the provisions for the younger children were under the circumstances construed with reference to the provisions for the eldest son): *Gray v. Earl Limerick*, 2 De G. & S. 370; *Savage*

v. *Carroll*, 1 Ball & B. 265; *Ellison v. Thomas*, 2 Dr. & Sm. 111; S. C., 1 De G. J. & S. 18; and *Re Bayley's Settlement*, L. R. 9 Eq. 491; S. C., L. R. 6 Ch. 590.

In the two last mentioned cases, the provisions for the younger children were contained in a deed contemporaneous with the settlement on the eldest child, and in *Re Bayley's Settlement* the real estate of the husband having been settled (subject to a life interest in the husband), on the first and other sons of the marriage successively in tail male, the provisions for the younger children were made by a separate deed, in which the settlement of the husband's estate was recited, and the real estate of the wife was settled (subject to a life interest in her), "to the use of all and every the son and sons (other than an eldest or only son), and daughter and daughters of the marriage, in equal shares as tenants in common" in tail; and it was provided that if any such younger son or daughter should die, and there should be failure of issue of his or her body, or in case any such younger son or sons should become an eldest or only son before he or they should attain the age of twenty-one years, then the share of such son or daughter, as well original as accruing, should go to the survivor or survivors, or others, of the younger sons or daughters (if more than one) in equal shares, as tenants in common in tail, and if there should be only one such son or daughter, to him or her in tail; and it was held, that a younger son who, after attaining twenty-one, became in the lifetime of his mother an eldest son, was not entitled to a share of the wife's estate, since at the time of distribution he had ceased to be a member of the class "younger sons."

Contemporaneous deed.

Rule applied to real estate settled in shares on younger children.

R. on his marriage settled real estate on himself for life, remainder to trustees for a term, remainder to the sons of the marriage successively in tail male, remainder to the sons of his second marriage successively in tail male, remainder to the daughters of the marriage successively in tail male, remainder to R. in fee. The trusts of the term were to raise £8,000 for the portions of the daughter or daughters and younger son or sons of the

Where eldest daughter takes estate.

marriage, if more than one daughter or younger son, the £3,000 to be payable among them as R. should appoint, or in default equally; but if only one daughter or younger son who should not at R.'s death be his eldest son, then to raise a sum not exceeding £2,000 for such only daughter or younger son payable as R. should appoint. R. had issue two daughters only: *Held*, that in the trusts of the portions term, "daughter" meant daughter not succeeding to the estate: *Stirum v. Richards*, 12 Ir. C. R. 323. See to the same effect, *Northumberland v. Egremont*, 1 Ed. 435, and *Remnant v. Hood*, 27 Beav. 74; S. C., 2 De G. F. & J. 396, where no portion was claimed by the daughter taking the estate; but see *Simpson v. Frew*, 4 Ir. Ch. R. 428; S. C., on app. 5 Ir. Ch. R. 517, *infra*.

Examples (2).—Eldest child not succeeding to the estate, held entitled to a share under provisions for younger children.

An estate was settled on a father for life, remainder to children as he should appoint, remainder to a trustee for a term for raising portions for younger children, remainder to the father's first and other sons successively in tail; the eldest son attained twenty-one and died without issue in the father's lifetime, and then the father appointed the estate to the younger son: *Held*, that the personal representatives of the eldest were entitled to a share under the provisions for younger children: *Davies v. Huguenin*, 1 H. & M. 730.

Daughter.

Where the limitations of the estate extended to daughters, and a daughter (the only child, except a son who died in infancy,) was married and died in the lifetime of the tenant for life, she was held entitled to a portion as being "a child other than an eldest or only son," though she was an only child at her death, on the ground that her remainder was liable to be divested by the birth of a son: *Simpson v. Frew*, 4 Ir. Ch. R. 428; S. C., on appeal, 5 Ir. Ch. R. 517, where the decision was approved of,

though the case was decided on another point: but see *Stirum v. Richards*, 12 Ir. Ch. R. 323, *ante*, p. 844.

A daughter, who though eldest child by birth, does not succeed to the estate, is a younger child within the meaning of the rule: *Pierson v. Garnet*, 2 Br. C. C. 38.

Land was settled on A. for life, remainder to his first and other sons successively in tail male, remainder to B. in tail male, remainder to A. in fee, with power to A. to charge portions for younger children, sons and daughters, who should be living at his death. A. exercised the power in favour of his daughters and died, having had two daughters but no son: *Held*, that both daughters were entitled to portions. Harcourt, C., said, "Every one but the heir is a younger child in equity, and the provision which such daughter will have is but as a younger child's, in regard the son goes away with the land as heir; so here, the estate by the settlement goes all to the remainderman, who is *hæres factus*, and neither of the two daughters is heir, wherefore the elder daughter, having no more than the younger, is (as to this provision) a younger child, and consequently capable of taking it": *Beale v. Beale*, 1 P. Wms. 244.

In *Ellison v. Thomas*, 2 Dr. & Sm. 111; 1 De G. J. & S. 18, the eldest son was only tenant for life, with remainder to his first and other sons in tail; but Lord Westbury, C. (reversing the decision of Kindersley, V.-C.), held that the rule must be applied in his favour, so that, on his death without issue male, before the time of distribution, his executors were admitted to share in the provisions for younger children. Some importance was attached to the words describing the class of children intended to be provided for, viz., "children . . . other than and besides an eldest or only son for the time being entitled under or by virtue of a certain indenture of settlement bearing even date herewith to certain estates": *Gray v. Earl Limerick*, 2 De G. & Sm. 370 is *contra*.

Eldest son
tenant for
life only.

First Exception.—A younger child who at the Younger child
succeeding, but

not under
settlement.

time of distribution is entitled to the estate, not by virtue of the original settlement by which, or by reference to which, the eldest child and younger children are defined, but by virtue of the subsequent dealings with it, is entitled to share in the provision for younger children.

Examples.—*Spencer v. Spencer*, 8 Sim. 87, where the eldest son and his father barred the estate tail, and resettled the property on the father for life, with remainder to the son in fee, and the son died intestate in the father's lifetime, so that the fee descended to the second son, who attained twenty-one, and died in his father's lifetime: *Tennison v. Moore*, 13 Ir. Eq. R. 424, where the eldest son joined with his father in barring the entail and resettled the estate, so that the second son who had become the eldest at his father's death, succeeded his father as tenant for life under the resettlement: *Adams v. Beck*, 25 Beav. 648, where the eldest son barred the entail, and devised the estate to uses, under which the second son had become entitled as tenant for life at the time of distribution: *Macoubrey v. Jones*, 2 K. & J. 684, where the eldest son and his father barred the entail, mortgaged the property, and resettled it in such a manner that the second son, who was the eldest at the time of distribution, became entitled to a share only of the estate. In all these cases, second sons or their representatives were held to be entitled to a share in the provisions for the younger children. The case of *Peacocke v. Pares*, 2 Keen, 689 (where the facts were the same as in *Adams v. Beck*, 25 Beav. 648, and it was held that the younger son who succeeded to the estate, was not entitled to any provisions as a younger child), must be considered to be no longer law. See also *Ex parte Smyth*, 12 Ir. C. R. 487. *Wakefield v. Richardson*, 13 L. R. Ir. 17, is an example where the point was raised (see p. 82), and seems to have been conceded.

Where under a power in a marriage settlement, uses

are revoked and new uses declared, whereby a younger child, who has since become an elder, takes through the mere bounty of his parent, property which, but for such revocation, he would have taken as eldest son under the settlement, he does not thereby cease to be entitled to a portion as a younger child: *Wandesforde v. Carrick*, Ir. R. 5 Eq. 486; see p. 497, where Chatterton, V.-C., said, "the plaintiff has become possessed of the settled estates as tenant for life, and of course if they were taken by him under the limitations of the settlement of 1812, he would have ceased to be entitled to a younger child's portion, but in my opinion he has not taken any estate under that settlement in such a sense as that he should be deemed an eldest son. Anne, Lady O., revoked the uses which constituted that instrument a settlement of the estate, and thus destroyed the settlement. . . . She then proceeds as a matter of bounty to devise the lands as her own property. The plaintiff no longer takes under the limitations of the settlement or as a child of the marriage, what he has taken cannot be deemed a portion or provision under that instrument, and it is therefore not within the principle on which this Court deals with such cases."

It need hardly be said that the doctrine under consideration will not be applied so as to give a share in the provisions for the younger children to an eldest son, who at the time of distribution would have been entitled under the settlement to the estate, but who has barred the entail, and so ceased to take under the settlement; *Collingwood v. Stanhope*, L. R. 4 H. L. 43.

Second Exception.—Apparently, where provisions are made for the younger children, or the eldest child is excluded, *nominatim*, the rule does not apply.

A testator bequeathed £20,000 to his son A. for life, with remainder in "case F., the eldest son of A., shall be living," to F. for life, with remainder to his children,

Eldest son who has disentailed.

Where provisions made *nominatim*.

and in default of children to the other sons of A. successively, on trusts analogous to the limitations of realty in strict settlement. He also bequeathed a share of the residue to A. for life, with remainder to "all the children of A. except F." F. attained twenty-one and died in the lifetime of A. unmarried, when B. became the eldest son of A., and on A.'s death became entitled to a life interest in the sum of £20,000: *Held*, that, notwithstanding B. had become the eldest son of A., he was entitled to a share in the residue, and that the representatives of F. were excluded; *Wood v. Wood*, L. R. 4 Eq. 48.

Provision was made by a father under a private Act of Parliament for his eldest son John, and power was given to the father to appoint a sum among "Stephen the son, Martha and Catherine the daughters of Stephen Jermyn the father, and the survivors or survivor of them, and such other child and children as the said S. Jermyn the father should hereafter have." The eldest son died without issue; then the father appointed in favour of Stephen: *Held*, that he was an object of the power. Lord Talbot, C., said, "Stephen is indeed called a younger child in the preamble; but when the power of appointment is given, it is not to appoint amongst the younger children generally, but to Stephen, Martha, and Catherine;" *Jermyn v. Fellows*, Ca. Temp. Talb. 98. Lord St. Leonards, in his comments on this case (Sug. Pow. 8th ed. 679) says, "The case seems to establish this principle, that where a younger child is included by his *name* in a power, he will continue an object of the power, although he lose his character of younger son." But he points out that Lord Talbot distinguished the case from *Chadwick v. Doleman* (2 Vern. 528), on the ground that there the question was between a younger son who had become the eldest and the other younger children, while in *Jermyn v. Fellows* it was between the only surviving child and the administrators of a deceased child, "so that this case," he says, "cannot perhaps be relied on as an authority for the general principle which at first sight it seems to establish." And see *Savage v. Carroll*,

1 Ball & B. 265, where Lord Manners, C. (at p. 278) distinguished *Jermyn v. Fellows*, saying, "As to the fact of the younger children being enumerated by name in that case and the same circumstance occurring here, I do not think any weight is to be attached to it; for here the mother was dead and all the children to take were ascertained."

By a marriage settlement a husband covenanted to pay £10,000 for the children of the marriage, and for want of such children, for the children of the wife by a former marriage, other than A. her eldest son, as the husband should appoint, and in default, for all such children, except as aforesaid, who should attain twenty-one, equally, and if only one, except as aforesaid, then in trust for such one younger child; the eldest son attained twenty-one, and died in his mother's lifetime; there were no children of the second marriage: *Held*, that the estate of the second son, who on the death of his brother succeeded to the family estates, and attained twenty-one and died in his mother's lifetime before the period of distribution was entitled to a share; *Sandeman v. Mackenzie*, 1 J. & H. 613; the judgment contains some important observations on the doctrine of "*in loco parentis*."

Third Exception.—Of course, if it clearly appear from the deed that the interests of the younger children are to vest indefeasibly at a time other than that of distribution, the rule does not apply; *Windham v. Graham*, 1 Russ. 331; see the comments on this case in *Re Bayley*, L. R. 9 Eq. 491: 6 Ch. 590.

Interests
indefeasibly
vested before
time of dis-
tribution.

Stock settled upon trust for children (except an eldest son entitled to settled estates), in equal shares, shares of sons to be vested at twenty-one, of daughters at twenty-one or marriage. There were two children, a son, who died an infant, and a daughter who married (before her

brother died), and became on her brother's death, entitled to the settled estates : *Held*, that the daughter took an absolutely vested interest in the stock : *Carter v. Earl Ducie*, 41 L. J. N. S. Ch. 153; S. C., 20 W. R. 228, where Bacon, V.-C., said that the daughter took on her marriage a vested interest in the whole fund, and he referred to the rule that an estate once vested is not to be divested but by plain express words. The circumstances and terms of the deed in this case were somewhat peculiar, and if it had been held—as was contended for—that the daughter taking the estates was to be considered as “an eldest or only son,” still on the terms of the settlement, an only son would have taken both the estates and the settlement fund.

See the modern form of trusts of the portions term, 3 Dav. Prec. 989, 1046; 2 K. & E. Comp. 569.

In loco Parentis.

In loco
parentis.

As to what amounts to a person placing himself *in loco parentis* see *Ex parte Pye*, 18 Ves. 140; S. C., 2 Wh. & Tud. 388 (5th ed.) at 378; *Powys v. Mansfield*, 3 My. & Cr. 359 (on app. from 6 Sim. 528), and the cases there cited; *Lyddon v. Ellison*, 19 Beav. 565; *Tucker v. Burrow*, 2 H. & M. 515; *Sandeman v. Mackenzie*, 1 J. & H. 613; *Fowkes v. Pascoe*, L. R. 10 Ch. 343; *Bennet v. Bennet*, 10 Ch. D. 474, where Jessel, M. R., says (at p. 477), “Now what is the meaning of a person *in loco parentis*? I cannot do better than refer to the definition of it given by Lord Eldon in *Ex parte Pye*, 18 Ves. 140, referred to and approved of by Lord Cottenham in *Powys v. Mansfield*, 3 My. & Cr. 359, 367. Lord Eldon says it is a person, ‘meaning to put himself *in loco parentis*; in the situation of the person described as the lawful father of the child.’ Upon that Lord Cottenham observes, ‘but this definition must, I conceive, be considered as applicable to those parental

offices and duties to which the subject in question has reference, namely, to the office and duty of the parent to make provision for the child. The offices and duties of a parent are infinitely various, some having no connection whatever with making a provision for a child; and it would be most illogical, from the mere exercise of any such offices or duties by one not the father, to infer an intention of such person to assume also the duty of providing for the child.' So that a person *in loco parentis* means a person taking upon himself the duty of a father of a child to make a provision for that child."

See also Peachey on Settlements, 509.

It appears to follow that whenever a stranger makes a settlement of an estate on an "eldest" child, and charges portions on it for the "younger" children, he has placed himself *in loco parentis* within the meaning of the rule (see Lewin on Trusts, 7th ed. 357); and hence that in every case where there are provisions made for an elder and the younger children, the above rules must be applicable, since the provisions must be either made by a parent, or, if made by a stranger, the mere fact of their being made in that form is of itself conclusive evidence that the stranger was *in loco parentis*. See the remarks of Lord Hardwicke, C., in *Teynham v. Webb*, 2 Ves. Sen. at 210, where a voluntary provision was made by a grandmother:—"She did it as a parent providing for the younger children of her daughter, and a grandmother in this Court is often considered as a parent." The rules, therefore, might be stated as rules of universal applicability and not as confined to provisions made by parents and persons *in loco parentis*. See *Swallow v. Binns*, 1 K. & J. 417.

Some doubt has been thrown on the correctness of the doctrine which limits the peculiar construction of "eldest" and "younger" children to cases where the provision is made by a parent or person *in loco parentis* by the remarks of Lord St. Leonards, Sugd. Pow., 8th ed. 680, where he says, "This distinction does not appear to be attended to at the present day."

But it must be remembered that he is speaking of the construction of powers to charge portions, which must from the necessity of the case be contained in the instrument creating the trusts, and must therefore (according to the doctrine laid down by Jessel, M. R., in *Bennet v. Bennet*, 10 Ch. D. 474) be created by a person *in loco parentis*. And Lord St. Leonards' remarks were disapproved of by Wood, V.-C. in *Sandeman v. Mackenzie*, 1 J. & H. at p. 628.

Where no
estate limited
to eldest child.

Rule 138.—In provisions made for younger children by a deed which does not limit an estate to, or does not refer to, or is not shown to be connected with, an instrument limiting an estate to, the eldest child, the words “eldest” and “younger” have reference to priority of birth. In these cases the time at which the character of eldest child and younger children is in general to be determined is the time of vesting. See Lewin on Trusts, Ch. xvii. s. 1, p. 360 (7th ed.).

Examples.—Trust in a settlement of stock to pay the income of a fund to M. for life, and at her death “to pay or transfer the stock to all her children, except her eldest or only son, in equal shares, at their respective ages of twenty-one years.” A younger son attained twenty-one and then became the eldest by the death of his elder brother before the time of distribution: *Held*, that his share was not divested: *Re Theed*, 3 K. & J. 375. See also *Sandeman v. Mackenzie*, *ante*, p. 345.

A. by deed appointed a sum of money on trust for his daughter B. for life, with remainder “in trust for the child, if only one, or all the children, except an eldest or only son, if more than one,” of B., who, either before or after the determination of the previous trusts, should attain twenty-one or marry, and if more than one, equally. A. died; then B.'s eldest son C. attained twenty-one and

died ; then B. died, leaving her second son D., who had attained twenty-one, and an infant daughter. At the date of the deed, certain estates stood limited, by a settlement to which A. was party, to the use of B.'s husband for life, with remainder to his sons by B. successively in tail : *Held*, that, as the provisions were not by a father, and as there was no reference in the deed of trust to the settlement of the estate, and there was nothing to show that A. had the settlement in his mind at the time of the appointment except that he was a party to it, the phrase "eldest son" meant eldest son at the time of vesting, so that D. who had subsequently to that time become the "eldest son" took a share in the fund ; *Domville v. Winnington*, 26 Ch. D. 382.

A sum of money was settled on marriage on trust for the husband (a baronet) and wife and the survivor for life, and then to transfer among all the children equally except an eldest or only son, the shares of sons to vest at twenty-one and the share of any child who died before the period of vesting to accrue for the benefit of the others except an eldest or only son. There were six sons : the first and last born died infants ; the second attained twenty-one and succeeded his father in the title but died without issue before the period of distribution ; the third and fourth sons attained twenty-one and died without issue ; the fifth attained twenty-one and succeeded his brother in the title, and was living at the period of distribution : *Held*, that the second son was the "eldest son" within the meaning of the settlement, and as such was to be excluded from any share, but the fifth son was entitled to take a share ; *Re Rivers*, 40 L. J. N. S. Ch. 87 ; S. C., 19 W. R. 318. The reports differ as to whether the fifth son took any interest in the family estate, and as the decision turned on the precise words of the settlement, which were very special, the case is not of much general importance.

See Lewin on Trusts, chap. xvii. s. 1, p. 354, 7th edit., and see the cases on wills, 2 Jarman, 202.

Observations on Rules 137, 138.—It appears impos- Evidence

connecting
deeds.

sible to say what evidence is sufficient to connect a deed by which provisions are made for "younger children" with the provisions made for "an eldest son" by a separate instrument not referred to in it, so as to bring the case within rule 137.

In *Teynham v. Webb*, 2 Ves. Sen. 198, where the provisions for the younger children were made by a grandmother and rule 137 was applied, the nature of the evidence is not stated: in *Domville v. Winnington*, 26 Ch. D. 382, *supra*, p. 353, where the provisions were made by a grandfather, the mere fact of his having been made party to a settlement under which the eldest son was provided for was held not to bring the case within rule 137.

"Besides;" "Other than."

"Besides;" "other than." Where provisions are made for children "besides" an eldest son, no children take unless there be a son; while, if the provisions be for children "other than" an eldest son, the younger children take whether there is a son or not; *Walcott v. Bloomfield*, 4 Dr. & War. at p. 235; S. C., 6 Ir. Eq. R. 227; cited and discussed in *Simpson v. Frew*, 5 Ir. Ch. R. 517, at p. 525.

CHAPTER XXV.

VESTING OF GIFTS TO CLASSES.

Class defined: Gift to class and A. where A. is not a member of it: where A. is a member of it: "The children of A. and B.": Immediate gift to class: To "A. and his eldest child": Gift in remainder to class: Gift by direction to pay, &c.: Gift confined to members of class living when remainder falls in: Vesting notwithstanding existence of power: Implied interest in default of appointment.

THE rules as to the vesting of real estate are fully discussed in Fearn, C. R.; and therefore we shall only incidentally refer to them. "Vest,"
meaning of.

As to the meaning of the word "vest," see Fearn, C. R. 1; Hawkins on Wills, p. 221 *et seq.*, where it is observed that "the only definition that can be given of the word 'vested' in English law, as applied to future interests other than remainders, is, that it means 'not subject to a condition precedent.'"

This chapter contains the general rules as to vesting of gifts to classes applicable to deeds of every nature; the next chapter contains the rules applicable to portions charged on land and to settlements of personalty made by a person *in loco parentis*.

Definition.—A group of persons denoted by a common description, as filling a common character, or holding the same position, constitute a class; *Re Chaplin's Trusts*, 12 W. R. 147; S. C., 33 L. J. Ch. 188. Thus, "A.'s children," or "the persons who at A.'s death shall be" "Class,"
what is.

B.'s next of kin," constitute a class. On the other hand, "A. and his children," or "A.'s children and B.'s children," do not constitute a class; the former phrase denotes an individual, A., together with a class; the latter denotes two classes. The distinction between a class and a class with an individual added, or two classes, is one of considerable importance. The cases (all arising on wills), which are collected in 1 Jarman, 269, and Theobald on Wills, 2nd ed., 607; (see *Re Allen, Wilson v. Atter*, 29 W. R. 480, following *Re Chaplin's Trusts*, 12 W. R. 147; see remarks, 25 Ch. D. 167, *Re Featherstone's Trusts*, 22 Ch. D. 111); show that where there is a gift to an individual A. and a class, as joint tenants, or tenants in common, the question, whether any, and which, members of the class take, depends upon the rules applicable to classes; and in like manner, if the gift is to two classes, the question, whether any and which members of each class take, must be determined without reference to the other class.

Gift to class and named individual not a member of the class.

Where there is a gift to a class, and a member of the class is included by name, the gift will receive the same construction as if he had not been named; see *Re Stanhope's Trust*, 27 Beav. 201; *Re Jackson, Shiers v. Ashworth*, 25 Ch. D. 162.

Gift to class and named individual who is a member of the class.

Where there is a gift to a class and a member of the class is excluded by name, the gift to the other members of the class will receive the same construction as if they were the only members of the class; *Shaw v. M'Mahon*, 4 Dr. & War. 481; S. C., 2 Con. & L. 528.

Context

The context may show that a gift to an individual and a class (*Porter v. Fox*, 6 Sim. 485), or a gift to two classes, is to be construed as if the individual and the persons constituting the class, or the persons constituting the two classes, formed one class only; *ex. gr.*, a gift to the children of A. living at certain time, and the issue of such of A.'s children as shall be then dead; for though "children" and "issue of deceased children," form different classes according to the definition of "class," *ante*, p. 355, yet under such a gift the children

and issue constitute but one class. So in *Fletcher v. Fletcher*, 9 L. R. Ir. 301, stated *post*, 360, where there was a limitation to "the children of W. and G. respectively," Fitzgibbon, L. J., observed (p. 308), that the children of W. and G. formed but one class.

The members of the two classes, or the individual and the members of the class take *per capita*; *Fletcher v. Fletcher*, 9 L. R. Ir. 301, on app. from 7 L. R. Ir. 40; see also *Lincoln v. Pelham*, 10 Ves. 166.

The meaning of the words "the children of A. and B." will be found discussed in 2 Jarman, 194; Hawkins, 118; *Re Featherstone's Trusts*, 22 Ch. D. 111; Theobald on Wills, 2nd ed. p. 241; the meaning of "the children of A. and B. respectively," in *Fletcher v. Fletcher*, 9 L. R. Ir. 301 on app. from 7 L. R. Ir. 40, and the effect of a limitation to "the heirs of A. and B.," *ante*, p. 283.

Per capita.

"Children of A. and B."

"Heirs of A. and B."

Rule 139.—Under an immediate provision for persons forming a class (as "children," or "issue"), only those in existence at the date of the deed take, and they take as joint tenants, unless the contrary is expressed.

Immediate gift to class (a).

"B., having divers sons and daughters, A. giveth land to B., *et liberis suis, et a lour heires*, the father and all his children do take a fee simple jointly by force of these words 'their heirs;' but if he had no child at the time of the feoffment, the child born afterwards shall not take;" Co. Lit. 9 a.

"In all grants of estates in lands there must be a person *in esse* to take at the time the estate vests by the grant; therefore, in case of a feoffment to one and his children and their heirs, if he has children at the time, the father and all his children take jointly in fee; but if he has no child, the father alone takes; an afterborn child cannot take, for the gift was immediate;" *per* Downes, C. J., *Crone v. Odell*, 1 Ball & B. 458.

(a) See Hawkins on Wills, 68; 1 Jarman on Wills, 156,

Examples.—Demise to A. and B., his wife, *et eorum primogenitæ proli successive*: they had then no issue, but afterwards had issue: *Held*, that after the death of A. and B., the issue could take nothing, as he was not *in esse* at the time of the grant, and by the grant he was to take jointly; *Stevens v. Lawton*, Cro. El. 121; S. C., *sub nom. Stephen's Case*, Owen, 152.

Immediate trust "for the children of A., who at that time had three children and now hath six:" *Held*, that the trust fund belonged to the three only; *Warren v. Johnson*, 2 Rep. in Ch. 69.

"To A. and his eldest child."

It has been thought that a limitation to "A. and his eldest child," gave an estate in remainder to the child if he was not born at the date of the limitation: see *per Saunders*, Serj., *arguendo*, *Colthirst v. Bejushin*, Plowd. (at p. 29a), and *per Mounson, J.*, in *Brent's Case*, 2 Leon. 14; *per Houghton, J.*, *Tyler v. Fisher*, Palm. 34; but this is erroneous (see the *Prior of Grimesby v. B.*, 17 Ed. 3, 29, pl. 30; 18 Ed. 3, 59, pl. 91; 2 Roll. Abr. 417, pl. 8), for if the child had been *in esse* at the time, he would have taken jointly, and as he was incapable of doing so, he could take nothing: see *ante*, p. 283.

The rule applies to gifts by way of appointment.

Demise to a husband, his wife, "and their children at the assignment of the husband." There was but one child at the date of the lease, but afterwards others were born. The wife died in the lifetime of the husband. The husband assigned to a child born after the date of the deed: *Held*, that he took no interest; *Cole & Friendship's Case*, 1 Leon. 287.

Gift in remainder to class (b).

Rule 140.—A provision by way of use of realty or by way of trust of realty or personalty in remainder to persons forming a class, as "children," or "issue," vests in those who are in existence at

the date of the deed, subject to open and let in those who subsequently come into existence before the remainder falls into possession: and if none are in existence at the date of the deed, it vests in all who come into existence before the remainder falls into possession.

As to whether persons taking under rules 139, 140 take as tenants in common or joint tenants, see *ante*, Chap. XIX. and Chap. XXIII., pp. 306, 320; *Fitzherbert v. Heathcote*, cited in *Bayley v. Morris*, 4 Ves. 794.

It used to be thought that children born after the date of the deed could not take; as when A. levied a fine to the use of B. for life, and after to the use of the children of C., *procreatis*. C., at the time of the fine, had two sons, and before the death of B. had two daughters, and it was held that the daughters could not take; *Frederick v. Frederick*, Cro. El. 334; but this case must be considered as overruled.

Examples (1) Realty.—Limitation in remainder “to the use of the issues female of the body of A. and the heirs of their bodies,” A. having then no daughter: *Held*, that all the daughters of A., born before the expiration of the prior limitations, took as joint-tenants for life, with several inheritances; *Matthews v. Temple*, Comb. 467; S. C. *sub nom.* *Earl of Sussex v. Temple*, 1 Ld. Raym. 310.

By marriage settlement lands were settled upon the husband for life, with remainder to the issue of the marriage, in such shares, &c., as he should appoint, and in default of appointment, to the issue, share and share alike: *Held*, that the several children of the marriage, as they respectively came into existence, took immediate vested interests, liable to be divested by an exercise of the power; *Heron v. Stokes*, 2 Dr. & War. 89; S. C., 1 Con. & L. 270; 3 Ir. Eq. R. 163; 4 Ir. Eq. R. 284.

(2.) Leaseholds.—Trust of leaseholds in a marriage settlement, after the deaths of the husband and wife, for

the children as they should appoint, and in default of appointment to all the children equally: *Held*, to be a vested remainder, which opened to take in the children as they came into being; *Lawrence v. Maggs*, 1 Ed. 453.

W. and G. (two brothers) being absolutely entitled (in certain events which happened) as tenants in common to leasehold houses, by deed, made in 1840, assigned the premises to S. upon trust for M. for life; and after the death of M., to the use of S.; and after the death of S., in trust for the children of W. and G. "respectively," in such shares as they or either of them might appoint; and in default of appointment, then to and amongst the said children equally and share alike. W. by will, purported to appoint all the premises to his then only child W. F., and died in 1869 without leaving any other child surviving. G. died, leaving several children and without making any appointment; and M. and S. also died: *Held* (affirming the decision of the court below), that the children of both W. and G. living at the date of the deed of 1840, and subsequently born were the objects of the non-exclusive power, and also the objects to take in default of appointment; and that, there having been only an exclusive exercise of the power, all such children became entitled; and that they took *per capita*; *Fletcher v. Fletcher*, 9 L. R. Ir. 301, on app. from 7 L. R. Ir. 40.

(3.) **Personalty.**—Marriage settlement of personalty on trust for the wife for life, remainder to her children as she should appoint, and in default of appointment for the children equally: *Held*, that the interests of the children vested at birth, liable to be divested by an appointment; *Vanderzee v. Aclom*, 4 Ves. 771; see *Gordon v. Levi*, Amb. 864 (where the marginal note is incorrect).

(4.) **Mixed Realty and Personalty.**—Covenant on marriage by the husband to settle all the real and personal estate of which he should die seised or possessed on his wife, if surviving, for life, with remainder, after the death

of himself and his wife, for all the children of the marriage equally: *Held*, that all the children became entitled to vested interests on coming into existence; *Nayler v. Wetherell*, 4 Sim. 114.

Observation.—This and the previous rule apply where the gift to the children is effected by a direction “to pay”: *Vanderzee v. Aclom*, 4 Ves. 771; “to pay, apply, or dispose of”; *Re Minor’s Trust*, 28 Beav. 50; or “to transfer, assign, and make over”; *Jopp v. Wood*, 2 De G. J. & S. 323; “to divide among”; *Lambert v. Thwaites*, L. R. 2 Eq. 151, but see rule 149, *post*, p. 391.

Gift by direction to pay to, &c.

Observation.—The rule does not apply if the gift is to such of the persons forming the class as shall be living when the remainder falls into possession; *Re Wolleston’s Settlement*, 27 Beav. 642; *Re Edgington*, 3 Drew. 202.

Gift confined to members of class living when remainder falls in.

Rule 141.—The existence of a power of appointment does not prevent interests taken under express limitations in default of appointment from vesting until and in default of appointment. See *per* Kindersley, V.-C., *Lambert v. Thwaites*, L. R. 2 Eq. 155; Sugden on Powers, 8th ed. 452; Fearne, C. R. 194; Farwell on Powers, 384; Chance on Powers, ch. XXII., s. 2 (where the cases are reviewed).

Vesting under express limitations in default of appointment.

In *Leonard Lovie’s Case*, 10 Rep. 78 a., see 85 a.; *S. C. sub nom. Prowse v. Worthinge*, 2 Brownl. 103, it was erroneously decided that the interests taken in default of appointment were contingent; and the same view was originally taken by Lord Hardwicke, C., in *Walpole v. Conway*, Barn. 153; but in *Cunningham v. Moody*, 1 Ves. Sen. 174, he appears to have altered his opinion; see *per* Lord Kenyon, C. J., 4 T. R. 64; 5 T. R. 521.

“Nothing is better settled than that, where there is a power of appointment to a class, and in default of appoint-

ment over to that or another class, this class takes a vested interest, subject to be divested by appointment. There was some doubt upon this in several cases; but the rule was settled by *Doe d. Willis v. Martin* (4 T. R. 39)"; *per* Sugden, C., *Heron v. Stokes*, 1 Con. & L. at p. 283; S. C., 2 Dr. & War. 89; where *per* Sugden, C., at p. 115:—"The rule is settled that no gift over on a contingency can prevent the previous estate from vesting. If the contingency happens the prior vested estate will be divested": S. C., 3 Ir. Eq. R. 163; 4 Ir. Eq. R. 284; where the rule is stated at p. 285:—"It is the clear and settled law of the land that a gift in default of appointment gives vested interests to all the objects of the power, subject to be divested by its exercise." And see *ib.* pp. 297, 298.

Examples (1) Realty.—Limitation in marriage settlement to use of wife and husband successively for life, remainder to the use of all and every the child or children of the marriage for such estates, &c., and in such parts, &c., as the husband and wife should by deed, or as the survivor of them should by deed or will appoint, and in default to the children equally as tenants in common in fee: *Held*, that the interests in default of appointment were vested; *Doe d. Willis v. Martin*, 4 T. R. 39. See to the same effect *Cunningham v. Moody*, 1 Ves. Sen. 174; *Doe d. Tanner v. Dorvell*, 5 T. R. 518; *Smith v. Camelford*, 2 Ves. Jun. 698; *Cox v. Chamberlaine*, 4 Ves. at p. 636; *Reade v. Reade*, 5 Ves. 744 (see p. 748); *Campbell v. Sandys*, 1 Sch. & Lef. 293; *Osborne v. Bury*, 1 Ball & B. 58; *Heron v. Stokes*, 2 Dr. & War. 89; S. C., 1 Con. & L. 270; 3 Ir. Eq. R. 163; 4 Ir. Eq. R. 284; *ante*, p. 359.

(2) Personality.—*Gordon v. Levi*, Amb. 364, where the marginal note is incorrect; *Madoc v. Jackson*, 2 Br. C. C. 588; *Teynham v. Webb*, 2 Ves. Sen. 198; *Cholmondeley v. Meyrick*, 1 Ed. 77; *Lawrence v. Maggs*, 1 Ed. 453; *Salisbury v. Lambe*, Amb. 383; S. C., 1 Ed. 465; *Mostyn v. Mostyn*, 1 Coll. 161; *Rooke v. Rooke*, 2 Ed. 8; *Hynes v. Redington*, 1 Jo. & Lat. 589; S. C., 7 Ir. Eq. R.

405, the two last-mentioned cases being on the construction of marriage articles.

Even if the power is to appoint by will only, the rule as to express limitations in default of appointment is the same. (*Secus*, when the gift in default is implied from the power; see *post*, p. 365.) Where power is by will only.

By post-nuptial settlement freeholds were conveyed to trustees, on trust to pay the rents to A. and his wife during their respective lives, and after the death of the survivor, to sell and divide the proceeds among all and every the children of A. in such shares and proportions as she should by will appoint: *Held*, that the property was vested in all the children, subject to be divested by an exercise of the power, and that, the power not having been exercised, the representatives of a deceased child were entitled to his share; *Lambert v. Thwaites*, L. R. 2 Eq. 151, where the earlier cases are discussed.

Rule 142.—Where there is a power of appointment among a class, but no express gift in default of appointment either to that class or to any other class or individual, or there is such a gift to arise only on failure of objects of the power, there is implied in default of appointment a gift to the class of persons who are capable of taking under an appointment in pursuance of the power; 2 Fearn, C. R. 194; Farwell on Powers, 379; Hawkins, 57; Jarman on Wills, 552, note (g). Implied gift in default of appointment.

Observation.—Rule 141 as to vesting applies to interests implied under rule 142: Chance on Powers, s. 2774 *et seq.*; unless the power is to appoint by will only; see *post*, p. 365. Vesting where gift in default is implied.

“If the instrument does not contain a gift of the property to any class, but only a power to A. to give it,

as he may think fit, among the members of that class, those only can take in default of appointment who might have taken under an exercise of the power;" *per Kindersley*, V.-C.; *Lambert v. Thwaites*, L. R. 2 Eq. 155.

We have not been able to find any case of a deed containing a gift over to arise only on failure of the objects of the power; see *Witts v. Boddington*, 8 Br. Ch. 95; S. C. cited 5 Ves. 508; *Butler v. Gray*, L. R. 5 Ch. 26.

Examples.—Settlement of leaseholds on trust for husband and wife for their lives, and if they should have issue, then after the decease of the survivor, to go to such issue, in such proportion, manner, and form as they or the survivor should appoint; the wife survived the husband; there was one child only, who died before the wife; no appointment was made: *Held*, that the child took; *Madoc v. Jackson*, 2 Br. C. C. 588.

Trust in remainder for C. for life, and after his decease on trust to assign amongst such of his children, and in such manner, shares, terms, and proportions, as he should by any writing appoint. C. died without exercising his power, having had several children. Three of them died before him, two after him and before the determination of the interests prior to C.'s life interest: *Held*, that all C.'s children took vested interests; *Wilson v. Duguid*, 24 Ch. D. 244. See to the same effect *Fenwick v. Greenwell*, 10 Beav. 412.

Where the objects of the power are to live till a future time.

"Although the power be to appoint by deed or will yet if the objects of it are required to be living at a deferred period, the implied gift in default will be to those persons only;" 1 Jarman on Wills, 552, citing *Halfhead v. Shepherd*, 28 L. J. Q. B. 248; *Re White's Trusts*, Joh. 656; *Re Phene's Trusts*, L. R. 5 Eq. 846; *Stolworthy v. Saucroft*, 38 L. J. Ch. 708. See *Re Meade*, 7 L. R. Ir. 51, and the remarks of Chitty, J., *Wilson v. Duguid*, 24 Ch. D. at p. 251.

Where only survivors take.

The context may show that only objects who survive the donee of the power are to take; *Winn v.*

Fenwick, 11 Beav. 438; S. C., 18 L. J. Ch. 337. See, however, the remarks of Kindersley, V.-C., L. R. 2 Eq. 159.

Observation.—If there is an express gift over in default of any exercise of the power (not in default of objects of the power) to persons other than the objects of the power, such express gift of course prevents the implication of a gift to such objects; *Jenkins v. Quinchant*, 5 Ves. 596, note (a), see p. 601; *Goldring v. Inwood*, 3 Giff. 139 (a will case); Farwell on Powers, 382.

One particular instance of the rule deserves stating separately:—

Where there is no express gift in default of appointment and the power is to appoint by will only, none but persons who survive the donee of the power form the class and are capable of taking under the implied gift in default of appointment; *Walsh v. Wallinger*, 2 Russ. & My. 78; *Freeland v. Pearson*, L. R. 3 Eq. 658; *Loder v. Loder*, 2 Ves. Sen. 530; *Sinnet v. Walsh*, 5 L. R. Ir. 27; and consequently interests under the implied gift are contingent on survivorship.

Settlement of fund after the deaths of A. and B. for such descendants of C. as B. should appoint by will: *Held*, power in the nature of a trust for descendants of C. living at B.'s death, entitling such descendants in equal shares as tenants in common in default of appointment, and that an appointment to the legal personal representatives of descendants of C. who died before B. was unauthorised; *Re Susanni*, 47 L. J. N. S. Ch. 65.

Observation.—The persons taking under an implied gift in default of appointment take as tenants in common; *Re Susanni*, 47 L. J. N. S. Ch. 65;

Express gift in default of exercise of power.

No express gift and power testamentary only.

Persons taking in default are tenants in common.

Wilson v. Duguid, 24 Ch. D. 244. See also *Casterton v. Sutherland*, 9 Ves. 445; *Re White*, John. 656 (will cases).

Rules 141 and
142
restated.

Observation.—The two preceding rules, Nos. 141 and 142, may be contrasted as follows; see *Lambert v. Thwaites*, L. R. 2 Eq. at 155. If there be a gift to a class, with a power to A. to determine in what manner and in what shares the members of the class are to take, they take immediately vested interests, subject to be divested by an appointment, so that in default of appointment they all take.

If there be no gift to a class, but a mere power to A. to give the property in such manner and in such shares as he thinks fit to the members of a class, and either no express gift in default of appointment, or, there being such a gift, it is to arise only on failure of objects of the power, there is implied in default of appointment a gift to those members of the class only who are objects of the power.

CHAPTER XXVI.

PORTIONS.

“Vesting” defined : Portions charged on land, when vested : Where no time appointed for payment : Where payable on event personal to portionist : Payment postponed for convenience of estate : Portions out of “rents and profits” : Portions not charged on land : When vested : Where the only gift is in the direction to pay, &c. : Maintenance clauses : Divesting of portions : Gifts over : Death before parents : Death before portion “payable,” &c. : Where only children surviving parents take : Where all take if some child survives parents : Indefeasible vesting irrespective of survivorship : Where no reference to age or marriage : “Leave” construed “have” : Substitutionary gift to issue of child dying before distribution : Recapitulation.

On the Vesting of Portions.

THE meaning of the word “vest” will be found discussed in Hawkins on Wills, p. 221, *et seq.*, cited *ante*, p. 355. “Vested”
interests,
what are ?

The rules as to the vesting of portions differ according as they are charged or not charged on land, see *per* Lord Hardwicke, C., *Teynham v. Webb*, 2 Ves. Sen. at p. 207. They have only been established after considerable differences of opinion, and dicta and even decisions of eminent judges will be found not in accordance with them.

(1.) *Portions Charged on Land.*

There is no rule of law which prevents a settlor from directing or empowering the donee of a power of appointment to direct the vesting of portions at any time the settlor or donee may choose. The following rules are rules of construction, applicable only in the absence of clearly expressed intentions as to the time of vesting. See *Henty v. Wrey*, 21 Ch. D. 332, where Lindley, L. J., in his (written) judgment states (at p. 359) the results at which he had arrived from a careful examination of all the authorities which he had examined, viz.—

“1. That powers to appoint portions charged on land ought, if their language is doubtful, to be construed so as not to authorize appointments vesting those portions in the appointees before they want them, that is, before they attain twenty-one or (if daughters) marry.

“2. That where the language of the power is clear and unambiguous, effect must be given to it.

“3. That where, upon the true construction of the power and the appointment, the portion has not vested in the lifetime of the appointee, the portion is not raisable, but sinks into the inheritance.

“4. That where, upon the true construction of both instruments, the portion has vested in the appointee, the portion is raisable, even although the appointee dies under twenty-one, or (if a daughter) unmarried.”

These conclusions must apply equally to cases in which the portions are limited directly in the settlement itself, and not through the medium of a power. The question in either case is one of construction (21 Ch. D. 338, 355); in the former case, of the settlement only, in the latter, of the instruments conferring and those exercising the power. In the latter class of cases (e.g., *Henty v. Wrey*), the further question (of law) may arise as to fraud on the power, a subject foreign to this work.

Rule 143.—Where no time is named for the vesting or payment of portions charged on land, they vest in sons at twenty-one, and in daughters at twenty-one or on marriage (*Davies v. Huguenin*, 1 H. & M. 730), and not before, unless an intention clearly appears to the contrary.

Where no time named for payment (a).

The rule is applied even though interim interest or maintenance is given; *Brathwaite v. Brathwaite*, 1 Vern. 334; *Boycot v. Cotton*, 1 Atk. at p. 555; *Ruby v. Foot*, Beatt. 581, stated *post*, p. 371.

Interest in portions.

“The meaning of a charge for children is that it shall take place when it is wanted. It is contrary to the nature of such a charge to have it raised before that time;” *per* Lord Thurlow, C., *Hinchinbroke v. Seymour*, 1 Bro. C. C. 395 (a case not correctly reported; see *per* Jessel, M. R., 21 Ch. D. 341); see also 21 Ch. D. 389, 356.

“The Court always goes as far as it possibly can to hinder the raising portions out of land for the benefit of representatives;” *per* Lord Hardwicke, C., *Van v. Clark*, 1 Atk. at p. 513.

“As to the general rule with regard to portions to be raised out of land, it has certainly been established, ever since *Pawlet v. Pawlet* (stated *post*, p. 374), that where there is a portion to be raised out of land, if the person dies before the day of payment comes, it sinks for the benefit of the heir, and determined on this reasoning, that the child did not want the portion, and therefore should not burthen the inheritance;” *per* Lord Hardwicke, C., *Lowther v. Condon*, 2 Atk. 181, a will case.

“It appears to me that the result of all the cases is that what the Court means by the child living to the time it should want the portion, is that the child should attain

(a) See Rules 144, 145. As to the meaning of “time of payment,” see *post*, p. 394. In some of the cases “time of payment” is used where “time of vesting” is meant; *ex. gr.*, *Lowther v. Condon*, 2 Atk. 181.

twenty-one or be married ;" *per* Lord Manners, C., *Ruby v. Foot*, Beatt. 581 (at 586), where many cases are commented on ; see *per* Turner, L.J., *Remnant v. Hood*, 2 De G. F. & J. at 412.

"There is considerable difficulty in reconciling all the authorities upon the question when a portion charged on land vests and when it does not, and the Court has often struggled even against the words of an instrument in order to avoid coming to the conclusion that a portion charged on land in favour of a child vested before such child attained twenty-one or married;" *per* Lindley, L.J., *Henty v. Wrey*, 21 Ch. D. at 858.

See the rule stated and authorities cited in 2 Spence, Eq. Jur. 892 *et seq.* ; Peachey on Settlements, Ch. XIV. p. 409 ; 3 Dav. Conv. (3rd ed.), Pt. 1, 440 ; Lewin on Trusts (7th ed.), 865 ; Sugd. Law of Property, 148 *et seq.*

There was formerly some difference of opinion as to this rule ; *Rivers v. Derby*, 2 Vern. at 74 ; *Smith v. Smith*, *ibid.* 92. See the latter part of Cox's note to 2 P. Wms. 612 ; and 3 Dav. Conv. 441, note (u).

Examples.—By marriage settlement a term was vested in trustees, to commence after the death of the survivor of the father and mother, in trust within twelve months after the death of the survivor to raise portions for daughters. *Held*, that a daughter who died at the age of five, after the father's death, and in the mother's lifetime, was not entitled ; *Bruen v. Bruen*, or *Brewin v. Brewin*, 2 Vern. 439 ; S. C. Prec. Ch. 195 ; 1 Eq. Ca. Abr. 267, pl. 2 (where it is added, "The daughter died within the year, but it does not so appear by this report") ; see *per* Turner, L. J., *Remnant v. Hood*, 2 De G. F. & J. at 418.

Under a marriage settlement a father had power to create a term for raising portions for younger children, to be paid at such time as the trustees should appoint ; the father limited the term and died. *Held*, that a younger child who survived the father and died under twenty-one, the trustees not having, as to him, made

any appointment, took nothing; *Warr v. Warr*, Prec. Ch. 213.

In *Ruby v. Foot*, Beatt. 581, by a resettlement made by a widow, tenant for life in possession, and her eldest son, a sum of £2500 was charged, to be raised at the end of twelve years after the widow's death, to be paid to the younger children "in the following proportions, viz., £1000 to J.," and £500 to each of the three daughters, to be paid to them respectively when raised, and until raised, £150 annually was to be paid out of the rents and profits by way of maintenance. J. subsequently died under twenty-one in his mother's lifetime. *Held*, that the £1000 was not to be raised. Lord Manners, C., said:—"The general rule is, that where there is a charge upon land, with or without interest, payable at a future day, it shall not be raised when the party dies before the time of payment: the exception to that rule is, where the time of payment is postponed for the convenience of the estate, *i.e.*, where the person is of capacity to receive and to have occasion for the charge, but the estate is not in a situation to pay; as, for instance, if an estate be limited to A. for life, remainder to B., charged with a sum of money for C., payable on the death of A.; if C. should die before A., yet the representative of C. would be entitled; for A. had the estate disencumbered, and the money could not be raised in his lifetime, but C. had a vested interest in the charge, as well as the remainderman in the estate charged" (*b*).

See, to the same effect, *Tournay v. Tournay*, Prec. Ch. 290. *Brathwaite v. Brathwaite*, 1 Vern. 384.

An example of both branches of the rule is *Davies v. Huguenin*, 1 H. & M. 780 (S. C. 32 L. J. Ch. 417; 11 W. R. 1040; 8 L. T. N. S. 448; 2 N. R. 101), where the representatives of a daughter who attained twenty-one and died a spinster in her parent's lifetime were held to be entitled (see 1 H. & M., p. 748), but the representatives

(b) The remarks that follow in the judgment, if correctly reported, are not in accordance with Rule 145, *post*, p. 375.

of a child who died an infant were held not to be entitled to portions.

See the cases discussed in *Edgeworth v. Edgeworth*, Beat. 828; *Remnant v. Hood*, 2 De G. F. & J. 896, on app. from 27 Beav. 74; *Davies v. Huguenin*, 1 H. & M. 780, at 748 *et seq*; *Henty v. Wrey*, 19 Ch. D. 492; S. C., 21 Ch. D. 382.

Rule applied
in favour
of other por-
tionists.

Observation (1).—The Rule will be applied for the benefit not only of the heir or person taking the estate, but, if such an intention is expressed, for the benefit of the other members of the class of portionists; *Davies v. Huguenin*, 1 H. & M. 780, at 746.

Rule excluded
by context or
circumstances.

Observation (2).—The context or circumstances may show an intent that the portions shall vest immediately; *Mayhew v. Middleditch*, 1 Bro. C. C. 162, where only one child survived the parents. Lord Thurlow, C., said (p. 165), "The point is not brought before the Court whether any died before twenty-one or marriage, so as not to want the portion. It is clear all the children were designed, according to the appointment. As to the time of vesting, according to the instrument, without any time named, they must vest immediately. This differs from all the cases, for this is a case where, after marriage and upon a view of an existing family, the parents have given portions to persons described."

Where pay-
able on event,
personal to
portionist.

Rule 144.—A portion charged on land and made payable on the happening of some event personal to the portionist does not vest unless and until that event happens, unless an intention clearly appears to the contrary; 2 Spence, Eq. Jur. 396; 3 Dav. Conv. 3rd ed. Pt. 1, p. 427; Lewin on Trusts, 7th ed., 367; Co. Litt. 237 a, Butler's note (1), and *per* Turner, L. J., *Remnant v. Hood*, 2 De G. F. & J. at p. 410.

Interest on
portions.

The fact that interest on the portion is given does not exclude the operation of the Rule; *Boycot v.*

Cotton, 1 Atk. at 555 (cited *post*), where interest was given at 5 per cent.; *Gawler v. Standerwick*, 2 Cox, 15; S. C. 1 Bro. C. C. 105 n. (a will case); *Rich v. Wilson*, Mosely, 68; *per* Lindley, L. J., *Henty v. Wrey*, 21 Ch. D. at p. 356; and see *Wakefield v. Richardson*, 13 L. R. Ir. 17 (stated *post*, p. 401), where maintenance was given, but the argument that the daughter who died an infant took nothing was not disputed.

“It is very clear that charges on land, payable at a future day, cannot be raised if the party dies before the payment; there is no difference at all, whether the charge is created by deed or will (a), nor whether it is provided by way of portion for a child or given merely as a legacy by collateral relations or others . . . I have often heard it said (b), that the reason why legacies, &c., charged on land, payable at a future day, shall not be raised if the legatee dies before the day of payment, though it is otherwise in the case of a charge on the personal estate, is this, that the heir is a favourite of a court of equity, and ought to have the preference of the representative of a legatee, and likewise that the Court will go as far as they can in keeping the real estate entire, and as free from incumbrances as possible. But I think the Court has never gone upon such reason; but the true reason I take to be this, that the Court will govern themselves, as far as is consistent with equity, by the rules of the Common Law. In the case of personal estate, the rule is the same here as in the Civil Law (c), that there may be an uniformity of judgments in the different courts; but in the case of lands, the rule of the Common Law has always been adhered to;” *per* Lord Hardwicke, C., *Prowse v. Abingdon*, 1 Atk. at 485.

(a) That the rule applies to settlements and wills alike: see *Smith v. Smith*, 2 Vern. 92.

(b) As in *Yate v. Fettiplace*, Freem. Ch. 243.

(c) See *post*, pp. 382, 392.

"It is settled now, whether the portion charged upon land be given with or without interest, by deed or will, if the person dies before the age at which it becomes payable, it shall sink into the estate;" *per* Lord Hardwicke, C., *Boycot v. Cotton*, 1 Atk. at p. 555. And see *per* Lord Hardwicke, C., *Harvey v. Aston*, 1 Atk. at p. 379.

"It is a well established rule as to portions or legacies payable out of land, that if made payable at a certain age, or marriage or other event personal to the party to be benefited, and such party die before that time arrive, the portion or legacy is not to be raised out of the land;" *per* Lord Cottenham, C., *Evans v. Scott*, 1 H. L. C. at p. 57.

Examples.—A term of years was limited in a settlement on trust to raise £2,000 for the daughters, and maintenance yearly not exceeding £20 per annum; if one daughter, £2,000, and if any daughter died, the survivors or survivor, if more daughters than one, to have the part of the daughters dying: viz., if the father die without issue male, or having such issue male by his then wife, if such issue should die in minority or unmarried, the trustees should out of the premises levy and raise £2,000 for the portion and portions of such daughter and daughters, together with a competent yearly maintenance for every such daughter and daughters not exceeding £20 per annum, and the £2,000 to be paid at twenty-one or marriage, which should first happen. The father died, leaving one son, who died without issue, leaving a sister who died under age and unmarried. *Held*, that she was not entitled to a portion: *Bond's Case*, 2 Ca. Ch. 165.

See *Verney v. Verney*, 2 Ed. 26, which is also an example of the next Rule.

By deed a term was limited to secure £4,000 apiece for the younger children of P. for their portions, to be paid them at their respective marriages or ages of one-and-twenty years, which should first happen; and for paying to them £100 per annum maintenance in the meantime. P. died, leaving two daughters, one of whom died

under age and unmarried. *Held*, that she was not entitled to a portion; *Poulet v. Poulet*, or *Pawlet v. Pawlet*, 1 Vern. 204, 321; 2 Rep. in Ch. 286; 1 Eq. Ca. Ab. 267, Pl. 1; 2 Vent. 366; Tud. L. C. R. P. 3rd ed. 816.

Charge by a father, under a power in a settlement, of certain sums as portions for his several children, *nominatim*, to be paid to such children as should have attained twenty-one before his death within one year after his death, and to such child as should be under twenty-one at his death, to be paid to his sons at twenty-one, and to his daughters at twenty-one or marriage, which should first happen, the respective portions to be paid with interest at £5 per cent. from his death to the payment thereof. *Held*, that a daughter who survived the father and died under twenty-one took nothing; *Boycot v. Cotton*, 1 Atk. 552.

As to an appointment of portions by will under a power in a deed, see *Burgess v. Mawbey*, 10 Ves. 319; *Aston v. Aston*, 2 Vern. 452; and as to the converse case, see *Remnant v. Hood*, 27 Bea. at pp. 79, 80. Appointment by will under a power in a deed and *c contra*.

Observation (2), *ante*, p. 372, on Rule 143, applies also to the present Rule.

Observation on Rules 143, 144.—The context, or circumstances, may show that a sum charged on land is to be treated as a provision made of money, and then the case falls within the rules as to portions not charged on land, *post*. Where money charged on land is treated as provision out of personality.

Examples of portions thus treated are *Reilly v. Fitzgerald*, Dru. tem. Sug. 122 (see 159); S. C., 6 Ir. Eq. R. 335 (see 351); *Re Dennis*, 6 Ir. Ch. R. 422; *Re Howard's Trusts*, 7 Ir. Ch. R. 344; *Teynham v. Webb*, 2 Ves. Sen. 198.

Rule 145.—Where the actual raising and payment of a portion charged on land is directed to be Payment postponed for convenience of estate.

postponed until the happening of a specified event having reference to the circumstances of the estate out of which it is made payable, such direction does not affect the question of vesting, which is not thereby postponed till the time of actual payment; Tud. L. C. R. P. 857; Fearne, C. R. 552, Butler's note; 2 Spence, Eq. Jur. 396; 2 P. Wms. 612, note; Sugd. Law of Prop. 143; *per* Lord Hardwicke, C., *Lowther v. Condon*, 2 Atk. 128 and 131; and see 1 Jarm. Wills (4th ed.), 834 *et seq.*

This Rule must be taken in connection with the two preceding Rules, so that, if portions are made payable after the death of the tenant for life, then whether they are or are not made payable at twenty-one, no child will take who does not attain twenty-one, but every child will take who attains twenty-one whether he does so in the lifetime of the tenant for life or not.

See this Rule distinguished from the preceding Rule in Fearne, C.R., 552 *et seq.* in notes.

In *Smith v. Partridge*, Ambl. 266, by a post-nuptial settlement, the estate was limited to A. and B., successively for life, remainder for a term of years upon trust within one year after the decease of A. and B. to raise £850 for a named daughter, R., her executors, administrators, and assigns. She was thirty years old at the date of the settlement, and died afterwards in A.'s lifetime. Clarke, M. R., said:—"The representatives are entitled; the present is not like the cases where portions are charged on land, payable at twenty-one or marriage, and the children die before either of those events happens: the portion sinks because by their death they could not want it. Here the daughter was of age, and had occasion for the money. The postponing the payment was merely for the convenience of the father and mother and the estate."

"It is a well established rule as to portions, or legacies,

payable out of land, that if the payment be postponed until the happening of an event not referable to the person of the party to be benefited, but to the circumstances of the estate out of which the portion or legacy is to be paid, such as the death of a tenant for life, then it will be raiseable after the death of the tenant for life, although the term out of which it was to be raised had not arisen in consequence of the party to be benefited not having been *in esse* at the time of the death of the tenant for life, as in *Emperor v. Rolfe*, 1 Ves. Sen. 208, *Cholmondeley v. Meyrick*, 1 Ed. 77, 85, and many other cases ;” *per* Lord Cottenham, C., *Evans v. Scott*, 1 H. L. C. at p. 57. See the judgment of Turner, L.J., in *Remnant v. Hood*, 2 De G. F. & J. 396 (on appeal from 27 Beav. 74), at pp. 410, 411.

Examples.—*Davies v. Huguenin*, 1 H. & M. 780 ; *Powis v. Burdett*, 9 Ves. 428 ; *Emperor v. Rolfe*, 1 Ves. Sen. 208 ; *Cholmondeley v. Meyrick*, 1 Ed. 77 ; *Verney v. Verney*, 2 Ed. 26 ; *Butler v. Duncomb*, 1 P. Wms. 448 ; *Pitfield's Case*, 2 P. Wms. 513.

Observation.—This Rule seems to apply also to portions out of a fund of personalty ; in *Howard's Trusts*, 7 Ir. Ch. R. at 352–3 (citing 1 Jarman on Wills, 840 (4th ed.), and *per* Wigram, V.-C., *Packham v. Gregory*, 4 Hare, 397, as to cases in which payment is postponed only to let in some prior interest), it is said, “The principle stated by Mr. Jarman would be more strongly applicable to a case like the present, of portions created by settlement.” See also *per* Grant, M.R., *Balmain v. Shore*, 9 Ves. at p. 507.

Exceptional case.—A., the father, and B., the eldest son, resettled an estate to the use of A. for life, remainder to trustees for a term to raise £1,100 to be paid to C., the second son, within six years after A.'s

death, or as soon after as the same could be raised, and in the meantime interest from A.'s death for maintenance. C. attained twenty-one, and died in A.'s lifetime. *Held*, that he took nothing. Stress was laid on the fact that the gift for maintenance necessarily supposed him alive at his father's death, and that, the interest being contingent, the principal must also be contingent; *Bradley v. Powell*, Ca. t. Talb. 198. This case was disapproved of by Lord Hardwicke, C., in *Tunstall v. Brachen*, Amb. 170.

Miscellaneous Examples of Portions raiseable on a Contingency.—Reversionary term in marriage settlement (in remainder after the estates tail) in trust in case there should be no son, or if there should be a son, and he should die under twenty-one, and without issue, then, by sale or rents and profits, in case the term should have taken effect in possession, to raise 6,000*l.* for the daughter or daughters, payable at sixteen, if either the husband or wife should be then dead; but if both should then be living, then within six calendar months after the death of either, with interest from the death of husband and wife, or either; and in case either of the daughters should die before the portion became payable, her share to go to the survivors; proviso that if no daughter should be alive at the time of the failure of issue male, the portions should sink. There was no son, and only one daughter, who attained sixteen, and died, living both parents. The wife subsequently died without a son. *Held*, that, as there was a possibility of the birth of a son at any time till the death of the wife, there was not a "failure of issue male" at the time of the daughter's death, but the proviso was still operative at the subsequent death of the wife, and consequently the daughter was not entitled to a portion: *Gordon v. Raynes*, 3 P. Wms. 184.

Realty settled on husband and wife in succession, remainder for a term on trust, if no issue male, or, if there were such, and they all died without issue male before twenty-one, and there should be one or more daughter or daughters, then to raise portions; Proviso,

that if there should be a son that should have issue male or attain twenty-one, the term should cease. A son attained twenty-one, and died in his father's lifetime. *Held*, that portions were not raiseable: *Worsley v. Granville*, 2 Ves. Sen. 381.

Portions out of "Rents and Profits," &c.

Rule 146.—A trust to raise portions out of the "rents and profits" of land charges them on the corpus, unless the context shows that annual rents and profits alone are meant. Peachey on Settlements, 430.

Portions out of "rents and profits ;"

The Rule extends to every case where a gross sum is charged, either by deed or will, on "rents and profits:" see the cases collected, 2 Jarman on Wills, 4th ed., 609.

"In general, where money is directed to be raised by rents and profits, unless there are other words to restrain the meaning, and to confine them to the receipt of the rents and profits as they accrue, the Court, in order to obtain the end which the party intended by raising the money, has, by the liberal construction of these words, taken them to amount to a direction to sell;" *per* Lord Hardwicke, C., *Green v. Belchier*, 1 Atk. 505.

"If a term was created to raise [a charge] by the rents and profits, I should say it might be done by sale or mortgage;" *per* Lord Thurlow, C., *Shrewsbury v. Shrewsbury*, 1 Ves. Jun. at p. 234.

"The rule is that where there is a trust to pay, or to raise and pay, or to raise or pay, gross sums out of rents and profits, that means out of the estate; and you may sell it or mortgage it for the purpose of paying the gross sum, the reason being that the sum is to be paid at once, and the rents and profits are not sufficient for that purpose;" *per* Jessel, M. R., *Metcalf v. Hutchinson*, 1 Ch. D. at p. 594.

See also the note (70) in 2 Ves. Jun. 480.

charged on
corpus ;

Examples.—*Where the portions were held to be charged on the corpus.*

Trustees directed to pay portions on fixed days out of the rents and profits, which the rents and profits would not allow : *Held*, that they might sell ; *Backhouse v. Middleton*, 1 Ca. Ch. 173 ; see this case stated by Jessel, M. R., in *Metcalfe v. Hutchinson*, 1 Ch. D., at p. 598.

Charge of portion, trustees to take the rents and profits of the land till the same shall be raised ; sale decreed : *Sheldon v. Dormer*, 2 Vern. 810 ; see also *Warburton v. Warburton*, 2 Vern. 420.

Trust of a term to raise portions " by and out of the rents, issues, and profits of the premises as well by leasing," &c. : no time fixed for payment : a mortgage for the portions upheld : *Ivy v. Gilbert*, Pre. Ch. 588 ; S. C., 2 P. Wms. 18 ; (disapproved of in *Mills v. Banks*, 3 P. Wms. 1).

Trusts of term to raise portions out of rents and profits : *Held*, that they might be raised by sale or mortgage : *Trafford v. Ashton*, 1 P. Wms. 415.

All the prior cases are discussed in *Allan v. Backhouse*, 2 V. & B. 65, a will case.

not charged
on corpus.

Examples.—*Where the portions were held not to be charged on the corpus.*

Context.

The context may show that annual rents and profits only are intended : *Mills v. Banks*, 3 P. Wms. 1 (see pp. 7, 8) ; and *Wilson v. Halliley*, 1 Rus. & My. 590 ; *Metcalfe v. Hutchinson*, 1 Ch. D. 591 (both cases on wills) ; see 2 Jarm. on Wills, 618 ; Peachey on Settlements, 488, who cites *Evelyn v. Evelyn*, 2 P. Wms. 659 ; *Okeden v. Okeden*, 1 Atk. 550.

Annuities.

Annuities,
&c., out of
"rents and
profits."

An annuity, or periodical payment, charged on the rents and profits is charged on the corpus ; see *Cupit v. Jackson*, 13 Pri. 721, at p. 788 ; *White v. James*, 26 Beav. 191 ; *Hall v. Hurt*, 2 J. & H. 76 ; *Scottish Widows'*

Fund v. Craig, 20 Ch. D. 208, (where the earlier cases are discussed, and *Graves v. Hicks*, 11 Sim. 551, is distinguished); unless the context shows that it is to be payable out of income only: *Clifford v. Arundell*, 27 Beav. 209; 1 De G. F. & J. 307 (stated *ante*, p. 175).

A direction that portions be raised out of rents and profits only, requires that the appropriation of the rents and profits should commence as soon as they become applicable for that purpose: and it is difficult to conceive (in the absence of expressed intentions to the contrary) how it is possible that any of the portions should remain in contingency after the appropriation has once begun. It follows:

Rule 147.—Where portions are payable out of annual rents and profits only, as distinguished from corpus, and no time is mentioned for vesting, every child who is alive at the time when the rents and profits begin to be applicable for that purpose takes a vested interest.

Example.—By marriage settlement lands were limited in strict settlement, proviso that if there should be no issue male, and there should be one or more daughters living at the husband's death, the trustees should stand seised to the intent that such daughter and daughters should receive 10,000*l.* out of the rents, revenues, and profits, together with 100*l.* per annum apiece for maintenance, from the death of the father till payment of the 10,000*l.* The husband died without male issue, leaving a daughter who died under twenty-one, without having been married: *Held*, that she was entitled to her portion; *Rivers v. Derby*, 2 Vern. 72. See, to the same effect, *Evelyn v. Evelyn*, 2 P. Wms. 659, 671; see also *Cowper v. Scott*, 3 P. Wms. 119 (a will case). It should be observed that the decision in *Rivers v. Derby*, as reported in Vernon, was put not on the ground of the portion being raiseable out of the rents and profits, but only

Portions out of rents and profits only.

Vesting of portions payable out of rents and profits only.

on the circumstance that no time was appointed for payment; but Jekyll, M. R., in his judgment in *Evelyn v. Evelyn*, appears to have considered that the vesting of the portion in *Rivers v. Derby* depended upon its being payable out of rents and profits.

When estate is discharged.

Observation.—It might be thought that, where the portions are payable out of rents and profits only, the estate would be discharged as soon as the rents and profits amounted to a sum sufficient to discharge the portions, whether they were actually paid or not; but this is not the case, see *ante*, p. 246.

By a marriage settlement a term of years was vested in trustees, in trust to raise out of the rents and profits, by annual payments of 500*l.* in each year, but not otherwise, the sum of 3,000*l.* for portions for younger children: *Held*, that the clause did not create a charge for six years only from the date of the deed, and that, no sum having been raised, the estate was not discharged at the end of the six years, although the rents during that time were amply sufficient to have satisfied the charge: *Re Forster*, Ir. R. 4 Eq. 152.

(2.) Portions not Charged on Land.

“*Debitum in presenti, solvendum in futuro.*”

A legacy (not charged on land, 2 De G. F. & J. 410) to A., payable at a future time or event certain, is held by the law of England (following the Civil Law; see Fearn, C. R. 552, note (g); 2 Spence, Eq. Jur. 395; 2 P. Wms. 612, note; 2 Ves. Sen. 262; 5 Ves. 518) to be *debitum in presenti, solvendum in futuro*: i.e. the payment only, not the vesting, is deferred; see *per* Kindersley, V.-C., *Parker v. Hodgson*, 1 Dr. & Sm. 578; and it would seem that the same doctrine applies at common law to a promise or covenant for payment (Co. Lit. 292*b*; *Goss v. Nelson*, 1 Burr. 226); and in equity to trusts for payment (*Combe v. Combe*, 2 Atk. 185). But under a promise to pay, or trust for payment, to A. when, or if, an uncertain event happens, A.'s interest is contingent,

both at common law (*Roberts v. Peake*, 1 Burr. 323), and in equity (*Campbell v. Prescott*, 15 Ves. 500).

As a general rule, the cases seem to make no distinction between wills and settlements in respect of the vesting of personalty portions, with the exceptions mentioned in the observation at p. 393, to rule 149, and at p. 402. But it is sometimes necessary to consider the different circumstances of a testator and a settlor, or as it has been called "the different characters of a will and settlement," see *per* Turner, V.-C., in *Farrer v. Barker*, 9 Ha. at p. 744.

Whether any distinction between wills and settlements.

The courts must have been familiar with questions arising on wills for a considerable period before settlements *inter vivos* of personalty were introduced; and it seems probable that the Court of Chancery, when called upon to deal with instruments of the latter class, adopted or assumed the applicability of the rules which it had already received from the Civil Law (see *Prowse v. Abingdon*, 1 Atk. 485, cited, *ante*, p. 373), as to the vesting of legacies; and the obvious distinction between burdening the common law inheritance with a charge for younger children and declaring trusts of an existing fund of personalty is in favour of immediate vesting in the latter case.

It is difficult to find conclusive authority that the civil law doctrine of the immediate vesting of personal legacies payable at a future time applies to trusts of personalty under settlements, for in each of the cases cited below there seem to have been special words; it is, however, submitted that the following Rule is, on the whole, established:—

Rule 148.—Where, in a settlement of personal property there is a trust for the children of A., payable at twenty-one, or being daughters on marriage, then, if there are no further words, every child becomes entitled to a vested interest at birth.

To all children payable at 21, &c.

It follows that if a child dies an infant, and

being a daughter without having been married, and whether in the lifetime of the parents, or of one of them, or not, the administrator of such child becomes entitled to its portion.

Payment
postponed for
convenience.

See Rule 145, p. 375, and Observation, *ante*, p. 377, as to the postponement of payment for the convenience of the estate.

In order to establish this rule it is necessary to show (1) that a gift to children of portions out of personalty (as distinguished from portions charged on land) vests at birth, and (2) that the vesting is not affected by the payment of the portions being postponed till twenty-one or marriage.

The authorities in support of this rule, some of which are stated at length below, are *Gordon v. Raynes*, 3 P. Wms. at 188; *per Willes*, C. J., *Harvey v. Aston*, 1 Atk. at 377; *Combe v. Combe*, 2 Atk. 185; *Vanderzee v. Aclom*, 4 Ves. 770 at 784, 787; *Jopp v. Wood*, 28 Beav. 53; S. C. 29 L. J. N. S. Ch. 406; 6 Jur. N. S. 20; and on app., 2 De G. J. & S. 323; 34 L. J. N. S. Ch. 625; 11 Jur. N. S. 833; *Mostyn v. Mostyn*, 1 Coll. at p. 167; *Mount v. Mount*, 13 Beav. 333: a *dictum per* Turner, L. J., *Currie v. Larkins*, 4 De G. J. & S. at p. 255; *Reilly v. Fitzgerald*, Dru. tem. Sug. 122; S. C. 6 Ir. Eq. R. 385; *Hynes v. Redington*, 1 Jo. & Lat. 589; S. C. 7 Ir. Eq. R. 405; *Re Orme*, 1 Ir. Ch. R. 175; *Re Howard's Trusts*, 7 Ir. Ch. R. 344. See also *per* Grant, M. R., *Balmain v. Shore*, 9 Ves. at p. 507.

Opinions
contra.

There are opinions *contra*, that portions out of a money fund are subject to the same rules as portions charged on land, and therefore do not vest until twenty-one or marriage; see 2 Spence, Eq. Jur. 395; *Hubert v. Parsons*, 2 Ves. Sen. at 262, stated *post*, p. 392; 2 P. Wms. 612, note; and *Teynham v. Webb*, 2 Ves. Sen. 198, where, though there was a term, yet the L. C. said, at p. 207, the money was not to be considered as charged on land.

Rule stated.

“Let us now consider the difference between a portion payable out of land, and one payable out of personal

estate: and the difference is, that if money be given to a man, payable when he comes of age, and he dies before the day of payment, it shall go to his executors; but, if it be a portion to be raised out of lands, it shall sink into the estate, for the benefit of the heir;" *per* Willes, C. J., *Harvey v. Aston*, 1 Atk. 377. See *ibid.*, at p. 379, where Lord Hardwicke speaks of "the difference between portions out of lands and personal *legacies*;" the case before him was on a settlement, but, as we have before remarked, the authorities seem to make no distinction between deeds and wills as to the present question.

By marriage settlement personalty was vested in trustees upon trust for the wife for life, and within one year next after her decease, in default of appointment (which happened) to pay the principal and all arrears of interest to all and every her child and children, part and share alike, and for want of such issue over. Arden, M. R., said (see pp. 784 and 787) that it was "a vested interest in all the children she might ever have upon their respective births, to be divested by the exercise of the power of appointment." (The question for decision was whether a daughter who attained twenty-one, but died before her mother, was entitled to share): *Vanderzee v. Aclom*, 4 Ves. 771.

"With respect to a money fund, where no time or age is appointed for the vesting of the shares, the children in general take immediate absolute interests in their portions, so as to pass them to their personal representatives, although they die minors and unmarried;" *Re Howard's Trusts*, 7 Ir. Ch. R. 350.

"The terms of the settlement are very ambiguous I am of opinion that the child did take a vested interest at the moment of its birth The grounds of my opinion are these—I think the recital in the settlement shows that this provision was intended to be and was considered as a money portion The parties contemplated the deaths of some of the children before twenty-one or marriage, and accordingly they provided for such an event by giving the share of the child

so dying to the survivors, but they only provided for such an event for the benefit of the other children as a class; they did not go on to make any provision for the event which has happened" [viz., of there being one child only who died an infant]. "I look upon this, therefore, as a money fund raisable in the event stated;" *per* Sugden, C., *Reilly v. Fitzgerald*, 6 Ir. Eq. R. 351; S. C. Dru. 122 (see 157, *et seq.*).

Examples of the Rule.—In a marriage settlement the trustees were (on the death of the survivor of husband and wife) to "transfer, assign, and make over 10,000*l.* to and between or amongst all and every the child and children . . . his, her, or their respective *executors, administrators, or assigns*, equally to be divided," &c., "if one, then to that one alone." There was a provision that the shares of such of the children as should be sons, if minors at the decease of the surviving parent, were to be paid, transferred, assigned, and made over to them at twenty-one (and of daughters, at twenty-one or marriage), with the interim interest by way of maintenance; Romilly, M. R., said (28 Beav. 57):—"Here is a direction that the shares vested while minors should be paid when they attained twenty-one years; how can I get over those express and distinct words of the settlement, and say that the shares of the children did not vest until they attained twenty-one?" There was a gift over in the event of there being no children, or if they should all happen to die before becoming "entitled." Four children survived their parents and attained twenty-one, and two (a son and a daughter), died in early infancy, living the parents, so that the gift over did not arise. The M. R. said (28 Beav. 58): "The Court will exercise considerable violence in qualifying the terms of a settlement for the purpose of making the fund vest as early as possible, so as to prevent the children from being excluded; but I never yet heard that the Court had violated or forced the terms of any settlement in order to prevent or postpone a vesting [till twenty-

one or survivorship (a)]; it has endeavoured to make it vest at an earlier period than twenty-one, but never at a later." On the appeal, Lord Cranworth, C., said (2 De G. J. & S. at 328):—"If the sentence had ended with its first member, there could be no doubt that every child at its birth obtained a vested interest, liable to be divested *pro tanto* on the birth of other children; but the argument is that this obvious construction is modified by the gift over. According to the original clause, every child at its birth became entitled But there is a gift over in case of the death of all the children before they should become 'entitled' to their respective shares. This, it was argued, shows that it could not have been intended to confer any indefeasible interest on a child at its birth—for how could a child die before it should become entitled, if it became absolutely entitled at the moment of its birth? The whole case depends on our putting a proper interpretation on the word 'entitled.' That word "Entitled." may, without any violence to language, mean entitled in interest, or entitled in possession—that is, entitled to payment. The M. R. considered the latter to be, in this case, the proper construction, and I concur with him I cannot adopt the reasoning of the appellants, by which they would fix arbitrarily on the majority of every child as the time at which its share was to vest." And it was accordingly held that the representatives of the infants took shares; *Jopp v. Wood*, 28 Beav. 58; on app. 2 De G. F. & J. 828; S. C. 29 L. J. (N. S.) Ch. 406; 6 Jur. (N. S.) 20, and on app. 34 L. J. (N. S.) Ch. 625; 11 Jur. (N. S.) 838.

In *Hynes v. Redington*, 1 Jo. & Lat. 589, S. C. 7 Ir. Eq. R. 405, the fund was by articles (which, however, were not executory, in the sense of being incomplete) agreed to be vested in trustees in trust for all the younger children, to be paid in such shares and at such times, &c., as the father should appoint, and in default to be paid to such children equally; the shares of sons to be paid at twenty-one, and of daughters at twenty-one or marriage, and in

(a) So in the other Reports.

the meantime, "until their portions should become payable," to apply any sums not exceeding the interest of their said shares respectively for or towards their maintenance." The father made no appointment. There were two daughters and one son, who all survived both parents, but subsequently one of the daughters died under age and unmarried. Sugden, C., said (1 Jo. & Lat. 604):—"It was contended that the surviving daughter took the whole fund by survivorship. There is no such gift expressed in the settlement; if she takes the whole, it must be by implication or construction, not by direct gift. There is no gift of the whole fund to an only child attaining twenty-one years, and I find no authority which authorises me, upon any supposed rule applying to gifts to a class, to hold that the only surviving (*b*) child will take the whole fund, without a direction in the settlement for that purpose. . . . The gift over to the son is in default of issue of the marriage" (which did not happen). "The [ultimate] gift over to the personal representatives of the husband shows that the fund was not to go over unless there was an absolute failure of children." And further (in S. C. 7 Ir. Eq. R. at 411, 412):—"The gift over satisfies me that the fund was not to go over unless there was an absolute default of other children. . . . The intention may have been to give the fund to the children who attained twenty-one, but I cannot alter the plain legal construction of the instrument. It is a trust for all the children. . . . They took vested interests as they were born, although their shares were not to be paid till a particular age, with maintenance in the meantime. It would be desirable in a well drawn settlement that it should contain clauses of survivorship and accruer in case the children died under the age when the portions are payable. But there is no such clause in this settlement, and I cannot introduce one."

In *Re Orme*, 1 Ir. Ch. R. 175, a fund was settled in trust, after the death of A., to transfer it, and all the in-

(*b*) *I.e.*, only child who survives twenty-one or marriage.

terest, &c., unto and amongst all and every the child or children of the marriage, or the issue of any such child or children who might happen to be *then* dead leaving issue, or to any one or more of such children, or issue of such deceased children, &c., at such ages, times, and in such shares, if more than one, and with such maintenance in the meantime and under and subject to such conditions, &c., and limitations over (such limitations over being for the benefit of some one of such children or issue) as A. by his will, &c., should appoint, and in default of appointment to pay the fund between all the children (if more than one) of the marriage, and the issue of any children who should then be dead leaving issue; and if but one, to such one child; the said fund to be paid to sons at twenty-one and to daughters at twenty-one or days of marriage, in case such ages or days should not take place until after A.'s death; but in case such should happen in his lifetime, then such payment should be postponed till after his death. It was declared that the shares of the fund and the interest thereof should, subject to the power, vest in sons at twenty-one and in daughters at twenty-one or marriage, though A. should be alive. A., by will, appointed the fund to the children share and share alike on attaining twenty-one or marriage with consent, and directed that the interest should be, for their maintenance, given in trust to his wife until the sons entered professions or attained twenty-one, and the daughters attained twenty-one or married with consent. It was *held*, 1st—That the portions were *by the settlement* vested before the period of payment; 2nd—That the provision *in the will* as to maintenance was of itself sufficient to vest the portions. And it was said that the express provision as to vesting could not qualify the previous part of the clause, and that the rules as to the vesting of portions and legacies are the same, *i.e.*, as appears from the authority cited (*Stephens v. Frost*, 2 Y. & C. Ex. 302, stated *post*, p. 394), in cases where there is a gift of the whole interim interest.

In *Bardon v. Bardon*, 16 Ir. Ch. R. 415, a sum of stock was under articles of agreement vested by a father,

A., in trustees on trust for A. for life, and after his death as to several specified sums thereof to transfer them respectively to his children C., N., J., B., E., and three others, in each case "for his (or "her") own absolute use and benefit," proviso, that no transfer or payment should be made to the said C., N., J., B., or E., until he or she should attain twenty-five, and also that in case any of them should die before the share to which he or she was entitled under the articles should have been transferred to him or her, the share of the person so dying should accrue to the survivors. A. died; then B. (a daughter) died under twenty-five and unmarried, and at her death J. and E. were under twenty-five. Then E. (a daughter) died under twenty-five and unmarried. The question was whether on E.'s death under twenty-five her accrued share of B.'s portion went over. The M. R. held that the portions were vested, notwithstanding the proviso as to transfer (see Rule 149, *post*), and some stress was laid on a direction that the dividends should be applied for maintenance. Therefore, though the gift over to the survivors operated to divest the original portions, yet the share accrued under the survivorship clause did not go over on death under twenty-five, but belonged to E.'s next of kin.

In *Combe v. Combe*, 2 Atk. 185, under a trust of personality for such son as should live to attain twenty-one, *when and at such time as such son should attain twenty-three*, a son who attained twenty-one and died under twenty-three, was held to have taken a vested interest at twenty-one.

See *Lawrence v. Maggs*, 1 Ed. 453, stated *ante*, p. 360, where a leasehold was settled on the parents successively for life, with remainder to the children, and it was held a vested remainder in the children.

Context may
exclude the
rule.

The context may show that a portion is not to vest at birth.

In *Mostyn v. Mostyn*, 1 Coll. 161, it was held that two

children who died infants, and without having been married, in their parents' lifetime, were excluded from sharing in the fund. Knight-Bruce, V.-C., said (p. 167): "The trust is for the children, but to be paid at twenty-one or marriage. . . . The words may or may not import a vesting on birth, according to circumstances. You must look at the rest of the settlement to see whether they import mere payment, or vesting. I find, in a subsequent part of the settlement, and in fact very near these words—forming almost part of the same clause—this declaration:—'That, in case there shall be no such child or children living at the time of the death of the survivor' (i.e. of the parents) 'or, if such, and they shall all happen to die before their respective ages of twenty-one years or days of marriage,' the fund is to go over. I think that this may be fairly taken as a sufficient indication of intention that the age of twenty-one or marriage was to be the period of vesting. Therefore I think that the two children who died minors (living their parents) without having married, did not acquire vested interests." The case stood over to make the personal representatives of the infants parties, and was re-argued on their behalf, when the V.-C. said that he adhered to his opinion on the construction of the settlement.

In *Re Dennis*, 6 Ir. Ch. R. 422, infant children were held not to be entitled; this was by force of a gift over in case there should be no issue living at the decease of the parents, or if there should be issue then living, and such issue should die under twenty-one, &c. It was held that either the shares did not vest till twenty-one, &c., or if they did vest at birth, they divested on death under twenty-one, &c.

See also *Re Colley*, L. R. 1 Eq. 496.

Rule 149.—Where a trust of personalty is created only by a direction for payment to or division among the children on an event personal to themselves, the time of vesting is the time appointed for payment or division.

Trust created
by direction to
pay on event
personal to
children.

Rule stated.

"The question in all such cases is whether the period of division is postponed on account of previous interests in the fund, which are given to other persons in the meantime, or on account of some qualification attached to the donee. In the former case, the deferred interest vests on the execution of the settlement ; in the latter it is contingent;" *per* Wood, V.-C., *Re Theed*, 8 K. & J. 379. Accordingly, in that case, the trust being to pay *at twenty-one*, it was held that children who did not attain twenty-one took nothing. And, on the other hand, in *Vanderzee v. Aclom*, 4 Ves. 771, at pp. 784, 786; *Re Minor's Trusts*, 28 Beav. 50, there being no qualification of age required, infant children were held entitled. See as to Wills, Hawk. 232; 1 Jarm. (4th ed.) 839 *et seq.* See also 2 Spence, Eq. Jur. 399.

In *Hubert v. Parsons*, 2 Ves. Sen. 261, a sum of £5,000 was to be raised out of a money fund of £9,000, and to be paid to younger children at twenty-one, with interest for maintenance. If any child died before its share was payable there was a gift over to the other younger children. There was only one younger child, who died an infant. *Held*, that the £5,000 was not to be raised for his representatives against the eldest son. The remarks of Lord Hardwicke in this case, taken in connexion with the circumstances before him, seem to express an opinion that the Civil Law doctrine as to the immediate vesting of a legacy payable at twenty-one, &c., does not apply to non-testamentary instruments. But he also remarks that there was no gift except in the direction to pay ("The power of raising and paying is directed and limited by the same words. There are no words to create any vesting, except those for raising and paying, which are at twenty-one. Supposing it had been in a covenant, and the child had died before twenty-one, it could never have become due"); and on this ground, and also on the force of the gift over, the decision might well be rested.

And in *Richardson v. Goodman* (*infra*), it was remarked that *Hubert v. Parsons*, though dealing with a fund of personalty, was analogous to cases of portions out of

land, as the settlement distinguished between the elder son and younger children.

In *Richardson v. Goodman*, 3 Ir. Jur. 317, a policy on the husband's life and a bond were settled upon trust (after the death of the wife) "to pay and apply the principal moneys, &c., among the issue of the marriage," with a power of appointment to the parents, and in default of appointment, to pay and apply the said moneys to and amongst the issue of the marriage in equal shares upon their respectively attaining their respective ages of twenty-one or days of marriage (if daughters). There were four children, of whom two died under age and intestate in the husband's lifetime. The wife also died in his lifetime. The power of appointment was never exercised. The two sons, J. and W., who survived the husband, were still infants. *Held*, that, as the whole intent of the instrument "must, *primâ facie* at least, be considered as intended to be for the purpose of raising portions for the issue, to be given to sons when they arrived at twenty-one, or to daughters at twenty-one or marriage," and as the language was ambiguous, the Court ought not to give vested interests to infants.

In *Campbell v. Prescott*, 15 Ves. 500, there was a trust for accumulation until the settlor's grandchildren then living, or to be born, respectively attained twenty-one, and on their respectively attaining twenty-one "upon trust to pay unto such grandchildren respectively as he, she, and they should respectively attain unto such age, his, her and their respective shares and proportions not only" of the fund but also of the interim interest. *Held* that a grandchild who died under twenty-one took nothing.

Observation.—In cases falling under this Rule, a gift of the whole interim interest to, or a direction to apply the whole interim interest for maintenance of, the children appears not to accelerate the vesting; *Jopp v. Wood*, 28 Beav. 53; on app. 2 De G. F. & Jo. 323 (stated *ante*, p. 387); *Hubert v. Parsons*, 2 Ves. Sen. 264 (cited *ante*, p. 392); *contra* in the case of a legacy (Hawkins on

Gift of interim interest.

Wills, 227). The only case where the vesting was accelerated by a gift of interest for maintenance is *Re Orme*, 1 Ir. Ch. R. 175: cited *supra*, p. 388; but this case appears to have been decided as to this point on the authority of *Stephens v. Frost*, 2 Y. & C. Ex. 302, and will cases. In *Stephens v. Frost* the property (leasehold) was vested in trustees "in trust for A. till he should attain the age of twenty-one years, and in the meantime in trust to collect the rents . . . and . . . apply them towards the maintenance . . . of A. during his minority, and upon A. attaining his age of twenty-one years upon trust to assign the premises and the accumulations of rents and profits, if any, to A. his executors, or administrators, for the unexpired remainder of the term." It will be observed that the corpus, not the interest only, was given to A. during his minority, so that the case is no authority on the point. See *Bardon v. Bardon*, 16 Ir. Ch. R. 415, *ante*, p. 389.

It is suggested in *Hubert v. Parsons*, 2 Ves. Sen. at 264, that possibly the direction for payment of the whole income for maintenance might make the principal vest in a child who survived the tenant for life but died under twenty-one, but there is no decision on the point.

Discretion to
apply interim
interest for
maintenance.

Contingent
gift of inter-
est.

It is decided that a mere discretionary power to the trustees of the fund to apply all or any part of the income for the maintenance of the persons contingently entitled to the fund; *Barnett v. Blake*, 2 Dr. & Sm. 117; or a contingent gift of interest, as in *Campbell v. Prescott*, 15 Ves. 500, *supra*, p. 393, does not vest the principal.

Divesting of Portions; Gifts over; Death before Parents.

Gift over on
death before
portions
"payable."

Where life interests in the settled real estate or personality are limited to the parents, or to one of them, the portions cannot (in most cases) be actually raised and paid over until the expiration of such prior interests; this is the period of distribution, when the portions become "payable" in the ordinary sense. An important question, therefore, arises where a child attains twenty-one or marriage (or other the time of vesting), and then

dies, living a tenant for life, and there are provisions in the settlement which seem to deprive such a child of its portion; *e.g.*, where there is a gift over of the share of a child dying before its portion becomes "payable," "assignable," or "transferable." These, and similar expressions (c), might refer either to age or marriage—*i.e.*, the time of vesting, or to the time of actual payment—*i.e.*, the period of distribution. "The words 'payable, assignable, or transferable,' have different senses according to the different clauses of the settlement to which they refer. With reference to the right or capacity of the children, the sense is 'at twenty-one or marriage.' But then the enjoyment of the persons entitled for life is not to be broken in upon. It is therefore provided that the right, which exists for every other purpose, shall not be exercised to their detriment. With reference to that interest, the sense is 'not till the death of the tenant for life.' But it is only with reference to that, that the preceding declaration is at all qualified; and as against every one but the tenant for life, the children have a right to say it remains unqualified As between themselves, the time of payment must be taken to be unaltered"; *per* Grant, M. R., *Schenck v. Legh*, 9 Ves. 810, cited with approval by Plumer, M. R., (*Walker v. Main*, 1 Jac. & W. at p. 8) who adds: "This construction is agreeable to the general leaning of the Courts in favour of vesting. The nature of the fund here makes no difference; for as after the death of the tenant for life the whole is to be distributed, it is indifferent whether it arises from real or personal estate."

"As soon as these clauses came forward, in *Emperor v. Rolfe* (1 Ves. Sen. 208), Lord Hardwicke put a just construction upon them; and he referred the word 'payable' to the time in respect of the quality of the child, distinguishing between that and the time when *ex*

(c) "Before they become entitled to their shares:" *Jopp v. Wood*, 28 Beav. 53; 2 De G. J. & S. 323; "Before being entitled in possession:" *Re Yates*, 21 L. J. Ch. 281; or "Entitled to payment;" *Re Williams*, 12 Beav. 817.

necessitate the money was to be *de facto* raised ;” *per* Lord Loughborough, C., *Willis v. Willis*, 3 Ves. at 54.

Wills.

This construction applies to wills ; *Hallifax v. Wilson*, 16 Ves. 168 ; see Hawkins on Wills, 218.

Survivorship.

Frequently there are, in the description of the class of children who are to take, or in other provisions of the settlement, expressions referring to survivorship. Many such cases may be classified as follows :—

To such children as survive, payable at 21, &c.

First :—Where the primary gift is to such children as survive the parent, payable at twenty-one, &c. In this case, if there are no further words, only those children who survive take ; see *per* Shadwell, V.-C., *Fry v. Sherborne*, 3 Sim. at 254 ; Lewin on Trusts, 864 ; so that it is impossible to make a provision for a child on its marriage in the parents’ lifetime. See *Bythesea v. Bythesea* (a will case), 23 L. J. N. S. Ch. 1004, where Turner, L. J., remarked that “in all the previous cases the settlement contained some provision inconsistent with the notion that the gift was to depend on survivorship.”

To all children payable at 21, &c., but contingent on some child surviving.

Second :—Where, though the provisions are for all the children, payable at twenty-one, &c., yet they are made contingent on some child surviving the parents, or a parent. In this case, although no child can take unless some child survives the parents or parent, yet, if any child survives, all the children are admitted to share ; in other words, the contingency does not form part of the description of the class ; *King v. Hake*, 9 Ves. 498 ; *Mostyn v. Mostyn*, 1 Coll. 161, see 167 ; *per* Wood, V.-C., *Swallow v. Binns*, 1 K. & J. 426–8 ; *Re Orlebar*, L. R. 20 Eq. 711 ; but even if any child survives, the same inconvenience will arise as in cases under the first head. See, *per* Lord Cottenham, C., 3 My. & Cr. 287–8.

But, though clear and unambiguous words must have their proper effect (3 Sim. 254), yet, in favour of the indefeasible vesting of portions in children who live to require a provision, the following rule of construction is established :—

Indefeasible vesting at

Rule 150.—Where, by a settlement made by a

parent or person *in loco parentis* (see *ante*, Chap. XXIV., p. 342), portions are provided, raiseable out of land, for the younger children of a marriage, or a fund of personalty is settled on parents for life, and afterwards on their children, and the children's shares are made payable, as to sons at twenty-one, and as to daughters at twenty-one, or marriage (in the usual form), the settlement will, if possible, be so construed, that every child on attaining twenty-one, or, being a daughter, on marriage, shall become indefeasibly entitled to a share, whether it survives the parents or not: *Howgrave v. Cartier*, 3 V. & B. 79; S. C., G. Coop. 66; Peachey on Settlements, 415; Williams on Settlements, 118; Sugd. Law of Property, 143, 144; Hawkins on Wills, 218; 2 Jarm. Wills (4th ed.), 799; Theobald on Wills, (2nd ed.) 418; Lewin on Trusts (7th ed.), 361.

The rule seems to be applicable as well to younger children's portions raiseable out of the family estate, as to trusts of personalty in favour of children, providing them with portions, in the sense of a parental provision, "The legal presumption in favour of the vesting in an adult child exists with respect to parental provisions of this description, as well as with respect to the portions of younger children, though, of course, where there is a substantive fund in lieu of a charge, there can be no question as to sinking for the benefit of the estate;" 8 Dav. Conv., p. 482, note.

"In settlements of this description there are two sets of clauses to be considered:—the clauses of gift to the children, and the clauses of gift over to others upon failure of the children; and the authorities require that both sets of clauses should be clearly and unambiguously expressed" (*i.e.*, in order to exclude the rule); *per* Leach, V.-C., *Perfect v. Ld. Curzon*, 5 Madd. 445.

21, &c., notwithstanding death before parents.

"Payable."

"The word 'payable' was construed in *Emperor v. Rolfe* (1 Ves. Sen. 208) to mean 'vested,' for the purpose of insuring the children their rights, and it was held that 'payable' is substantially the same as 'vested.' It would be a mere parade of learning to go all through the cases in which that rule was cited as settled. . . . I am not aware that it was ever departed from, except when the settlement contained language so strong as to show that the word was intended to be used in a different sense. If the words in the settlement were 'before the child shall have actually received the portion,' that would be sufficient to point to actual payment, and to take the case out of the rule. . . . It may be shown by the terms of the settlement in any particular case that it is inapplicable;" *per* Sullivan, M. R., *Wakefield v. Richardson*, 18 L. R. (Ir.) 17. See also *per* May, C. J., *ibid.*, at p. 36:—"It is well established that the term 'payable,' or 'paid,' when used with reference to the portions of children in a settlement, may be properly understood to mean, not the actual receipt of the money fund, but the vesting in interest of such fund in a child, the actual payment being postponed until the death of the parents, who usually have a life interest in the income."

"When a portion is provided for a son on attaining twenty-one, or for a daughter on attaining that age or being married, and these events happen in the lifetime of the parent, the child, even though it died in the lifetime of the parent, has acquired an absolute vested interest in the portion;" *per* Shadwell, V.-C.; *Fry v. Ld. Sherborne*, 3 Sim. 259.

"In this case the grandfather is providing for his children and grandchildren in such a manner as throughout to place himself, with regard to the grandchildren, in the position of one who is performing a father's part, and providing . . . portions for his several grandchildren. . . . Whereas, in the case of ordinary instruments, an express estate thereby limited cannot be enlarged except by necessary inference, yet upon instruments of this description, there is an implication of law arising upon

the instrument itself, subject of course to any expression to the contrary, that it is the intention of any person who places himself *in loco parentis* to provide portions for children or grandchildren, as the case may be, at the period when those portions will be wanted, namely, upon their attaining the age of twenty-one or (as is usually provided in the case of daughters), upon their attaining twenty-one or marriage; and that such portions shall then vest, whether the children do or do not survive their parents. It is thought to be an unnatural supposition that the circumstance of such children or grandchildren predeceasing their parents should have been contemplated as depriving them of the whole of the portion intended for their benefit;" *per* Wood, V.-C., *Swallow v. Binns*, 1 K. & J. 424, 425.

"If there be any doubt as to the meaning of the words used, the Court must struggle to put such a construction upon the settlement as will let in all the children of the marriage who attained twenty-one years, whether they did so in the lifetime of their parents or not;" *per* Hall, V.-C., *Jeyes v. Savage*, L. R. 10 Ch. 558, n., where the cases are commented on. And see the statement of the principle by Lord Cottenham, C., in *Whatford v. Moore*, 8 My. & Cr. at 289, cited with approval by James, L.J., *Jeyes v. Savage*, *ubi supra*.

And see *per* Stuart, V.-C., *Bailie v. Jackson*, 1 Sm. & Giff. at p. 177.

"The case of *Emperor v. Rolfe* (1 Ves. Sen. 208), originally established the strong and [*sed qu.*] un rebuttable presumption that in marriage settlements the shares of children are intended to become vested when they are wanted; that is to say, in the case of sons at twenty-one, and of daughters at twenty-one or marriage;" *per* James, V.-C., *In re Wilmott's Trusts*, L. R. 7 Eq. 537; cited with approval in *Wakefield v. Richardson*, 13 L. R. (Ir.) at p. 28, stated *post*, p. 401.

The contest is generally between the representatives of a child who attains twenty-one, &c., and dies in the lifetime of the tenant for life, on the one hand, and those

children who survive the tenant for life, on the other hand. (See *per* Lord Cranworth and Turner, L.JJ., *Bythesea v. Bythesea*, 23 L. J. Ch. 1004; and *per* Sugden, C., *Kimberly v. Tew*, 4 Dr. & War. at 150). The following observations of Jessel, M.R., in *Day v. Radcliffe*, 3 Ch. D. at 657, must be read with reference to the foregoing remarks:—"There is a series of authorities which establishes that, as regards marriage settlements, and also as regards post-nuptial settlements containing a recital of an intention to provide for all the children of a marriage, you are not as a general rule to read the instrument in such a way as to make the provision for a child depend on surviving both parents. But it is laid down, both by Sir William Grant in *Howgrave v. Cartier* (3 V. & B. 79), and by Lord Cottenham in *Whatford v. Moore* (3 My. & Cr. 270), that if the settlement clearly and unequivocally makes the right to a provision depend on survivorship, then the rule does not apply. What is 'clear' and 'unequivocal' is very difficult to say. What is clear to one mind might not be so to another. In the last case on the subject, *Jeyes v. Savage* (L. R. 10 Ch. 555), the Court of Appeal differed from Vice-Chancellor Hall, and such differences of opinion must always occur in construing ambiguous instruments." (See *per* Turner, V.-C., *Farrer v. Barker*, 9 Hare, 743). "But the Lord Justice James in that case cites with approval a passage from the judgment of Lord Cottenham in *Whatford v. Moore* (3 My. & Cr. 270), the concluding words of which are these:—"The cases upon this subject turn upon such nice distinctions, and are so little reconcilable, that the only reasonable course is to adopt the rule, which has been generally recognised, of leaning in favour of a construction which includes all the children, if the instrument affords fair grounds for doing so; but if not, to give effect to the plain meaning of the words used." I think that is a sensible rule. When you find fair ground for doing so, then, in marriage settlements and post-nuptial settlements containing a recital of an intention to provide for all the children of a particular person or par-

ticular persons, you are to lean to that construction which includes them all; but you are not to have recourse to old authorities to overcome the plain meaning of the words used."

In *Wakefield v. Richardson*, 13 L. R. (Ir.) 17, by a marriage settlement lands were conveyed upon trust (after successive life estates to the husband and wife) to raise thereout a sum of £3,000, which it was agreed should be divided in equal shares to and among all the children of the marriage, save such as under preceding limitations should succeed to the lands, the shares of sons to be paid to them at twenty-one, of daughters at twenty-one or marriage (such marriage if during minority to be with specified consent), with interest for the same by way of maintenance, to be computed from the death of the survivor of the husband and wife, "with benefit of survivorship to the survivor or survivors of such children, if any of such children shall die before his, her, or their share or shares shall become payable, unmarried, and without leaving issue as aforesaid." There were three daughters of the marriage, of whom one died a spinster under twenty-one, and the others could claim no share of the £3,000, inasmuch as they took estates under the settlement; and two sons, E. and T., both of whom attained twenty-one, but only E. survived both his parents, T. having survived his mother but died a bachelor in his father's lifetime:—*Held*, (affirming *Sullivan*, M. R.) that both E. and T. acquired indefeasibly vested shares at twenty-one, and the fund was accordingly divisible in moieties between E. (the plaintiff) and the representatives of T. (*In re Wilmott's Trusts*, L. R. 7 Eq. 532, discussed.) Sir E. Sullivan cited the judgment of Jessel, M. R., in *Day v. Radcliffe* (*ante*, p. 400), and said: "The later authorities on these settlements compel me to hold that in plain and unequivocal words, the children who reached the age of twenty-one years became entitled to vested interests in their portions, and that the child who attained the age of twenty-one years, but died before his parents, took a

vested interest. . . . I have not found any case in which *Emperor v. Rolfe* has been invaded, save where the provision is by the plain words of the settlement made dependent on survivorship.”

See also *per* Lord Cottenham, C., *Bouverie v Bouverie*, 2 Phill. at p. 351; S. C. 16 L. J. Ch. 411; 11 Jur. 661.

When no reference to age or marriage.

As to whether the time of attaining twenty-one or of marrying will be held to be the time of indefeasible vesting in cases in which there is no reference to these periods in the settlement; see *Teynham v. Webb*, 2 Ves. Sen. at 207; *per* Turner, L. J., in *Remnant v. Hood*, 2 De G. F. & J. at pp. 413, 414; and *Reilly v. Fitzgerald*, Dru. 122; S. C. 6 Ir. Eq. R. 335 (where there was only one child, and the trusts in that event made no reference to time).

Wills.

That the rule applies to wills, see 3 Dav. Conv. (3rd ed.), p. 437, note, citing (*inter al.*) *Jackson v. Dover*, 2 H. & M. 209; *Dalton v. Hill*, 10 W. R. 396; *per* Wood, V.-C., *Mendham v. Williams*, L. R. 2 Eq., at p. 399; and see *Re Knowles*, *Nottage v. Buxton*, 21 Ch. D. 806.

As to the weight to be attached to the circumstance that the instrument is a settlement and not a will, see *per* Turner, V.-C., *Farrer v. Barker*, 9 Ha. at p. 744; *per* Turner, L. J., *Bythesea v. Bythesea*, 23 L. J. Ch. 1006; *per* Kindersley, V.-C., *Re Crosse's Will*, 32 L. J. Ch. 344; S. C., 9 Jur. (N. S.) 429; 1 N. R. 419; and *per* Wood, V.-C., *Swallow v. Binns*, 1 K. & J. 425, *ante*, p. 399.

“In cases of settlements, if there is reason to collect, however loose and ambiguous the language may be, that all the children of the marriage were intended to take, then, although there may be words which go to express that those only shall take who shall be living at the death of the parent, the Court holds that all the children who attained the age of twenty-one, although they died in the lifetime of the parent, shall take. A gift by will differs from the case of a trust declared by a settlement, because in the former there is no supposition that any

persons can be intended to take, except those who are described as takers;" *per* Shadwell, V.-C., *Tucker v. Harris*, 5 Sim. 548.

Examples.—(1) Portions held indefeasibly vested in children who attained twenty-one or marriage, but died before tenant for life.

First: Where gift over on death before share "payable," "transferable," &c. Gift over before payable.

(a.) Portions out of land:—*Emperor v. Rolfe*, 1 Ves. Sen. 208 ("due and payable"); *Cholmondeley v. Meyrick*, 1 Ed. 77 ("due and payable"); *Willis v. Willis*, 3 Ves. 51; *Fry v. Ld. Sherborne*, 3 Sim. 243 ("payable").

(b.) Out of personalty:—*Jeffreys v. Reynous*, 6 Bro. P. C. 398 (stated 9 Ves. 311, 3 Sim. 258) "assignable," "transferable;" *Salisbury v. Lambe*, 1 Ed. 465; S. C., Amb. 383; *Schenck v. Legh*, 9 Ves. 300 (see settlement more fully stated, 5 Ves. 452) "payable, assignable, or transferable;" *Mocatta v. Lindo*, 9 Sim. 56, "before share payable, without leaving issue;" *Re Williams*, 12 Beav. 317; S. C., 19 L. J. Ch. 46, "before becoming entitled to payment, assignment, or transfer."

See the cases on Wills, 2 Jarm. (4th ed.) 799 *et seq.*

Secondly:—Where gift over if no child, or if all the children should die in the parents' lifetime:—*semble*, if the words are plain they must prevail. See *dictum* in *Schenck v. Legh*, 9 Ves. 300, at p. 312. There was a clause to this effect in the settlement in *Currie v. Larkins*, 4 De G. J. & S. 245, but no question arose on it. Gift over if no child, or if all children die in parents' life.

Thirdly:—Where the primary gift is to children who survive the parent.

(a.) By the inaccurate use of the word "such," so "Such." that the trusts in default of children, allowed a construction as in default of children generally and not of surviving children:—*Woodcock v. D. of Dorset*, 3 Bro. C. C. 569 (see a more

Gift over not
fitting prior
trusts.

accurate statement of the settlement in note to *Howgrave v. Cartier*, 8 V. & B. 79, at p. 82, S. C. Geo. Coop. 66, at p. 78; *King v. Hake*, 9 Ves. 488; *Howgrave v. Cartier*, *ubi sup.*; *Bailie v. Jackson*, 1 Sm. & G. 175; *Swallow v. Binns*, 1 K. & J. 417.

- (b.) Where gift over in such forms as not to fit the prior trusts:—*Hope v. Ld. Clifden*, 6 Ves. 499; *Powis v. Burdett*, 9 Ves. 428; *Perfect v. Ld. Curzon*, 5 Madd. 442; *Torres v. Franco*, 1 Russ. & M. 649 (see 3 Dav. Conv. p. 434, note); *Mostyn v. Mostyn*, 1 Coll. 161; *Gordon v. Hope*, 3 De G. & Sm. 351; S. C. 18 L. J. Ch. N. S. 228; *Bailie v. Jackson*, 1 Sm. & G. 175; *Dixon v. Barkshire*, 84 Beav. 537; *Wynne v. Brady*, 5 Ir. Eq. R. 289; *Re Dennis*, 6 Ir. Ch. R. 422, stated *ante*, p. 391.

See also *Bouverie v. Bouverie*, 16 L. J. Ch. 411; S. C. 2 Phill. 349, 11 Jur. 661 (a will case), where Lord Cottènam, C., following *Salisbury v. Lambe* (1 Ed. 465; S. C. Ambl. 383) referred a gift over to survivors to the time of indefeasible vesting.

- (c) By the effect of an advancement clause:—*Powis v. Burdett*, 9 Ves. 428.

In *Currie v. Larkins*, 9 L. T. N. S. 688; 10 Jur. N. S. 9; on app. 4 De G. J. & S. 245; 12 W. R. 515, there was a declaration that the shares should become vested and transmissible interests in sons at twenty-one, in daughters at twenty-one or marriage, "which shall first happen after the decease of the survivor of" the parents: it was held that these latter words did not make it necessary for a child to survive the parents in order to take a vested interest; and accordingly the representatives of a son who attained twenty-one and died in the life of the surviving parent, took a share.

"Leave"
construed
"have."

Observation.—The use of the word "leave" in the course of provisions for children would seem, *prima facie*, to confine the gift to children surviving the parents, or to

make the gift contingent on some one child surviving; but in obedience to the Rule the Court will endeavour to construe "leave" as meaning "have;" see *e. g. Powis v. Burdett*, 9 Ves. 428; *Rooke v. Rooke*, 2 Ed. 8; *Bradish v. Bradish*, 2 Ball & B. 479; *Houston v. Barry*, 5 Ir. Eq. R. 294; *Wynne v. Brady*, 5 Ir. Eq. R. 289; 2 Jarm. Wills (4th ed.) 828. But see *Orlebar's Trusts*, L. R. 20 Eq. 711.

Examples (2).—Where it was held that only children surviving the stated time could take:

Wingrave v. Palgrave, 1 P. Wms. 401; *Gordon v. Raynes*, 3 P. Wms. 184; *Hotchkin v. Humfrey*, 2 Madd. 65; *Fitzgerald v. Field*, 1 Russ. 416 (see 480); *Balmain v. Shore*, 9 Ves. 500; *Whatford v. Moore*, 8 My. & Cr. 270 (see 27 Beav. 81); *Jeffery v. Jeffery*, 17 Sim. 26; *Skipper v. King*, 12 Beav. 29; *Lloyd v. Cocker*, 19 Beav. 140; *Re Heath*, 23 Beav. 193; *Re Wollaston*, 27 Beav. 642. See also *Tucker v. Harris*, 5 Sim. 538; *Wilson v. Mount*, 19 Beav. 292 (will cases); and per Turner, L. J., in *Remnant v. Hood*, 2 De G. F. & J. at p. 411.

Observation.—Since one of the objects of the Rule is to make some provision for the issue of children who marry and die leaving issue in their parents' lifetime, it will not be applied in cases where the issue of a child dying before the tenant for life are substituted for their parent; *Jeyes v. Savage*, L. R. 10 Ch. 555; *Re Orme*, 1 Ir. Ch. R. 175, *ante*, p. 388; *Re Wilmott*, L. R. 7 Eq. 532; 2 Jarm. Wills (4th ed.), 803.

Probably it will not be applied where trusts extend to daughters, and their shares are made payable to them on (*inter alia*) marriage, and there is a gift over to issue on the death of their parents before their portions are "payable;" for, in such cases, if "payable" is to be referred to the time of vesting, the substitutionary gift to

Substitution of issue for children dying in their parents' lifetime.

Where trusts extend to daughters.

issue of daughters can never take effect; *Day v. Radcliffe*, 3 Ch. D. 654.

But the Rule will be applied if the issue of a child dying before twenty-one are substituted for it; *Mocatta v. Lindo*, 9 Sim. 56. But see remarks on this case in 3 Dav. Conv., p. 485, note, and *per James, V.-C.*, in *Re Wilmott*, L. R. 7 Eq. at 537.

Recapitulation. To recapitulate:—

In the absence of clearly expressed directions as to vesting;

1. Where no time is named for the payment of portions:—

(a) If charged on land they vest in sons at twenty-one, in daughters at twenty-one or marriage.

(b) If out of a personal fund they vest at birth.

2. Where the payment is postponed till an event personal to the portionist:—

(a) If charged on land the portions do not vest unless and until that event happens.

(b) If out of a personal fund they vest at birth.

3. Where a portion is given out of personal fund only by a direction for payment on an event personal to the portionist it does not vest until and unless such event happens.

4. In all the above cases the fact of the actual raising or payment of the portion being postponed for the convenience of the estate makes no difference.

5. In a settlement made by a person *in loco parentis* the right of a child to a portion will not depend on its surviving its parent, unless the words clearly and unambiguously make the right so dependent.

CHAPTER XXVII.

COVENANTS (a).

Covenant explained: Executory and executed covenants distinguished: Covenant operating as assignment: Assignment operating as covenant: No set form of words necessary to create covenant: Covenants implied on whole deed: Recital creating covenant: Admission of debt by recital: Clause introduced by a participle, or words "to be": "Provided": Breach of trust, when a specialty debt: Covenants in law—by words "demise," "let," "give," "grant": Implication negatived by express covenants: Agreement under seal to execute deed which is to contain covenants: Construction against the covenantor: "It is hereby agreed and declared": Exception to absolute covenant: Proviso repugnant to or limiting personal liability: Penalty or liquidated damages: Specific Performance or Injunction where penalty or liquidated damages.

ALTHOUGH the word "covenant," in its strict sense, "Covenant," means an agreement under seal, that something has or ^{meaning of (b).} has not already been done, or shall or shall not be done hereafter, *Shep. Touch.* 160, 162, it is sometimes, especially in agreements, applied to any promise or stipulation whether under seal or not: *Hayne v. Cummings*, 16 C. B. N. S. 421; and see *Brookes v. Drysdale*,

(a) It follows from Rule 2, p. 8, that a covenant cannot be construed by the interpretation that has been put on it by the parties; *Baynham v. Guy's Hospital*, 3 Ves. 295; *Eaton v. Lyon*, 3 Ves. 690; *Moore v. Foley*, 6 Ves. 232; *Iggulden v. May*, 9 Ves. 325; S. C., 7 East, 237; 2 Bos. & P. N. R. 449; except in the case of an ancient document, *ante*, p. 74.

(b) A man cannot covenant with himself, nor with himself and others jointly; *Faulkner v. Lowe*, 2 Ex. 595.

8. C. P. D. 52, where the word "covenant" in an agreement was held to include a proviso; *Severn and Clerke's Case*, 1 Leon. 122, where "covenants, articles, and agreements" in a bond included a recital.

Covenant executed or executory.

A covenant may be executed, *i.e.*, that a thing "has or has not been done;" *e.g.*, that A. has not incumbered; or executory, *i.e.*, that something "shall or shall not be done;" *e.g.*, that A. will execute a further assurance. Where, however, the covenant is that property shall as from the date of the deed belong to another, it will not take effect as a covenant, but may operate in equity as a conveyance: see *Holroyd v. Marshall*, 10 H. L. C. 191; *e.g.*, a covenant "that my horse is yours;" *Shep. Touch.* 162; *Plowd.* 108, *Arg.*; a covenant to stand seised before the Statute of Uses; a covenant that you "shall have my land for five years;" *Shep. Touch.* 161. See also the cases cited *ante*, pp. 44, 45; and as to easements or *profits à prendre* created by covenants, see the cases cited, *ante*, p. 184, and *Northam v. Hurley*, 1 El. & Bl. 665.

Covenant operating as assignment.

Assignment operating as covenant.

On the other hand, an attempted assignment of property of which the assignor is not the present owner cannot take effect by way of conveyance, but it may operate as a contract to convey the property when the assignor shall have become owner of it. In *Collyer v. Isaacs*, 19 Ch. D. 842, where there was an assignment by way of security to a creditor of chattels which might be afterwards brought on to the premises, Jessel, M.R., said:—"That assignment constituted only a contract to give him the after-acquired chattels. A man cannot in equity any more than at law assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment. If a person contract for value, *e.g.*, in his marriage settlement, to settle all such real estate as his father shall leave him by will, or purport actually to convey by the deed all such real estate, the effect is

the same. "It is a contract for value which will bind the property if the father leaves any property to his son."

But in *Re D'Epineuil, Tadman v. D'Epineuil*, 20 Ch. D. 758, Fry, J., held that a charge by A. on "all his present and future personalty" by way of security, was inoperative as to after-acquired property, on the ground that such property was undefined. See the remarks of Lopes, J., in *Lazarus v. Andrade*, 5 C. P. D., at p. 820; and see *Clements v. Matthews*, 11 Q. B. D. 808; *Reeves v. Barlow*, 12 Q. B. D. 436; *Walker v. Bradford Old Bank*, *ib.* 511.

A stipulation merely negating an obligation is not a covenant; *Bartlett v. Hodgson*, 1 T. R. 42.

Stipulation
negating
obligation.

Rule 151.—No particular form of words is necessary to create a covenant. It is sufficient if, from the construction of the whole deed, it appear that the party means to bind himself.

No special
words neces-
sary to create
covenant.

"There needs not formal and orderly words as 'covenant,' 'promise,' and the like, to make a covenant on which to ground an action of covenant, for a covenant may be had by any other words; and upon any part of an agreement in writing, in what words soever it be set down, for anything to be or not to be done, the party to or with whom the promise or agreement is made, may have this action upon the breach of the agreement;" *Shep. Touch.* 162.

Rule stated.

"Wherever the intent of the parties can be collected out of a deed for doing or not doing a thing, covenant will lie," *per* Nottingham, C., *Hill v. Carr*, 1 Ca. Ch. 294; S. C., sub nom. *Hollis v. Carr*, 2 Mod. 86, and sub nom. *Holles v. Carr*, 3 Swan. 638.

"No particular technical words are necessary towards making a covenant;" *per* Lord Mansfield, C. J., *Lant v. Norris*, 1 Burr. 290.

"It is fully established that no precise form of words is necessary to constitute a covenant. 'Any words in a deed which show an agreement to do a thing make a cove-

nant' (Com. Dig. *Covenant*, A. 2); but it must be clear that they are meant to operate *as an agreement*, and not merely as words of condition or qualification; Com. Dig. *Covenant*, A. 8; 1 Roll. Abr. 518, pl. 8, 4;" *per* Lord Denman, C. J., *Wolveridge v. Steward*, 1 Cr. & M. 657.

"It is undoubted law that no particular word, or form of words, is necessary to create a covenant; but that any words are sufficient for that purpose which show an intention to be bound by the deed to do or omit that which is the subject of the covenant; any such words are sufficient, and some such words are necessary, to make a covenant;" *per* Cur., *Rashleigh v. S. E. Ry. Co.*, 10 C. B. 682.

"To charge a party with a covenant, it is not necessary that there should be express words of covenant or agreement. It is enough if the intention of the parties to create a covenant be apparent;" *per* Tindal, C. J., *Courtney v. Taylor*, 6 M. & Gr. 867; S. C. 7 Scott, N. R. 765.

"The doctrine [as to implied agreements] which is to be collected from the cases, is involved in much difficulty. It is not always possible to see what is and what is not sufficient to raise an implied agreement. This, however, is a plain, intelligible, sensible, and settled rule that, whereas you ought never to imply a covenant against the intention of the parties, so it goes further, and you ought not to imply an agreement unless, in the fair and honest construction of the deed, it appears that it was the intention of the parties, or unless it is absolutely necessary to imply it; and when it is said you ought not to imply a covenant unless it is necessary, that must be taken to mean when it is necessary, in order to carry into effect the intention of the parties, that it should be implied; and that means, not the intention of the parties merely that payment should be made, but their intention that the deed should operate by way of agreement to pay;" *per* Kindersley, V. C., *Iven v. Elwes*, 8 Drew. 84.

But the Court must "be satisfied that the language does not merely show that the parties contemplated that the thing might be done, but it must amount to a binding agreement upon them that the thing shall be done;" *per*

Parke, B., *James v. Cochrane*, 7 Exch. at p. 177. (See *per Cockburn, C. J., Smith v. Mayor of Harwich*, 2 C. B. N. S., at p. 669.)

On the other hand the parties cannot stipulate that an agreement under seal shall not create a covenant. In *Ellison v. Bignold*, 2 J. & W. 508 (see 510), certain parties "resolved and agreed and did, by way of declaration and not of covenant, agree," and it was held that they had covenanted. Agreement under seal must amount to covenant.

Lease "upon condition that" the lessee shall do certain things; this is a covenant by the lessee; 4 Cru. Dig. Tit. 32, Ch. 26, s. 6; 1 Roll. Abr. 518, pl. 5. "Upon condition."

"I have in my hands a writing obligatory, and I will be ready at all times to re-deliver the same writing obligatory to B.;" *held*, covenant to do so; *Walker v. Walker*, 1 Roll. Ab. 519, pl. 8. "I will be ready to."

Conveyance in fee with clause of warranty; eviction on prior title for years; the grantee can bring covenant on the warranty; *Rudg v. Pincombe*, 1 Roll. Rep. 25; S. C., sub nom. *Pincombe v. Rudge*, Hob. 8 (see 28). See *Williamson v. Codrington*, 1 Ves. sen. 511. Warranty.

A proviso may amount to a covenant, or it may be merely a qualification of the preceding covenant. If a lessee for years covenants to repair, provided always and it is agreed that the lessor shall find timber: the word "agreed" operates as a covenant to find timber: if this word had been omitted it would only have operated as a qualification of the covenant by the lessee; *Holder v. Tayloc*, 1 Roll. Ab. 518. See Co. Lit. 203b; *Shep. Touch.* 122. Proviso.

Examples.—(1.) Covenant implied on construction of the whole Deed.—By deed it was agreed between A. and B. "that A. shall give £775 to B. for his lands, &c., the money to be paid before Midsummer;" *held*, that the words amounted to a covenant by B. to convey the lands, &c.; *Pordage v. Cole*, 1 Wms. Saund. 319 (ed. 1871, vol. I., 548). Covenant implied from whole deed.

Agreement in a charter-party that "forty days shall be allowed for unloading and loading again;" *held*, that a

covenant not to detain the ship more than forty days for loading must be implied; *Randall v. Lynch*, 12 East, 179.

Covenant by a lessee that he would, at all times and seasons of burning lime, supply the lessor and his tenants with lime at a certain price and for certain purposes; *held*, to imply a covenant by him to burn lime at all such seasons; *Shrewsbury v. Gould*, 2 B. & Al. 487.

Covenant in a lease that the tenant should fold "his flock of sheep which he should keep on the demised premises;" *held*, that this amounted to a covenant to keep a flock of sheep on the premises; *Webb v. Plummer* 2 B. & Al. 746.

Words of
exception.

Covenant by lessee to plough the demised premises, *except* the warren, in due course of husbandry; *held* to imply a covenant not to plough the warren; *St. Alban's v. Ellis*, 16 East, 352.

In an agreement for a lease of trade premises it was provided, "that all the coals consumed and used by the plaintiff for the purpose of his manufacture during the term should be bought and purchased of the defendants, provided the defendants could and should supply him with the quantity that should from time to time be required by him, or to such extent as the defendants could supply; and that the defendants should charge for the same at a given price and no more: and further that the defendants should not be compelled to supply more than 500 tons per week; and that in case the defendants should from some substantial cause be unable to supply coal to the extent agreed upon, they should give the plaintiff six months' notice of such their inability, and in such case the plaintiff should be at liberty to obtain his supply of coal, or the excess beyond the quantity that the defendants could supply, from any other source; *held*, that this amounted to a covenant by the defendants to supply the plaintiff with coal to the extent of 500 tons per week, unless prevented by some substantial cause; *Wood v. Copper Miners*, 7 C. B. 906.

Agreement for sale of a business, the purchase-money to be payable by instalments contingent on the amount of

profits of the business; *held*, that, as the amount of purchase-money depended on the profits of the business, there was an implied covenant by the purchasers to carry it on; *Telegraph and Intelligence Co. v. McLean*, L. R. 8 Ch. 658. See *King v. Accumulative Assurance Co.*, 8 C. B. N. S. 151, *post*, p. 415.

"Provided always, and these presents are upon this express condition, &c," in a lease held to amount to a covenant; *Brookes v. Drysdale*, 3 C. P. D. 52; S. C. 26 W. R. 381.

Conveyance in fee, with a restriction by way of use against carrying on certain trades; *held*, to amount to a covenant not to carry them on; *Hodson v. Coppard*, 29 Beav. 4; S. C., 80 L. J. Ch. 20.

The following cases may also be referred to: *Seddon v. Senate*, 13 East, 63; *Great Northern Railway Co. v. Harrison*, 12 C. B. 576; *Knight v. Gravesend, &c. Co.*, 2 H. & N. 6; *Monypenny v. Monypenny*, 4 K. & J. 174; 3 De G. & Jo. 572; 9 H. L. C. 114; *Gerard v. Lewis*, L. R. 2 C. P. 305; *Rigby v. Great Western Railway Co.*, 14 M. & W. 811.

Examples.—(2.) No covenant implied on the construction of the whole deed.—The plaintiff covenanted with the defendant that D. should for five years from that date serve the defendant in the art of a surgeon dentist, and attend for nine hours each day; and the defendant in consideration of the services to be done by D., covenanted with the plaintiff that the defendant would during the five years, in case D. should faithfully perform his part of the agreement, particularly as to the nine hours, but not otherwise, pay to D. certain weekly sums. D. remained for some time in the defendant's service and faithfully performed his part of the agreement, but defendant during the term dismissed D.; *held*, that there was no implied covenant that the defendant would allow D. to serve him during the whole of the term; *Dunn v. Sayles*, 5 Q. B. 685.

The plaintiff conveyed two pieces of land to a Railway Company, subject to the performance by them of certain

agreements therein recited, being to the same effect as the covenants contained in the deed hereinafter stated, and one of the pieces of land was described as "a slip of land then being intended to be formed into a new course for the river Beult;" and by deed of even date the company covenanted with the plaintiff to make a new bridge over the intended new cut for the use of the plaintiff within three months after the permanent rails of the railway should be laid down; and after the same should be completed, to reconvey to the plaintiff the slip of land which should form the new course of the river Beult, so far as the same should be diverted; and also to fill up and level the then existing course of the river Beult so far as the same should have been diverted; *held*, that there was no implied covenant to make a new cut and divert the stream; *Rashleigh v. South-Eastern Railway Co.*, 10 C. B. 612.

By deed, A. & B., who were partners, assigned to the plaintiffs all the partnership, stock debts, and sums of money, and all other the personal estate and effects and property of them as such partners. At the date of the deed, A. was indebted to the partnership; *held*, that there was no implied covenant by A. to pay to the plaintiffs the sums due from him to the partnership; *Aulton v. Atkins*, 18 C. B. 249.

By deed a Corporation agreed with a contractor that he should make certain works, which the Corporation were empowered by Act of Parliament to make, at a certain price, subject to the following provisions, namely (*inter alia*) "that the assent of the Commissioners of Woods and Forests shall be given to the said Mayor, &c., to carry out the said works so far as the same affect the land or soil of the Crown"; *held*, that no covenant was implied on the part of the Corporation to obtain the assent of the Commissioners; *Smith v. Mayor, &c. of Harwich*, 2 C. B. N. S. 651.

A. effected a policy on his own life, by the terms of which policy certain funds only, in exoneration of the shareholders, were liable to answer claims on the company.

The company ceased to carry on business; *held*, in an action by the insured, that there was no implied covenant by the company to continue to carry on the business; *King v. Accumulative Assce. Co.*, 3 C. B. N. S. 151: see *Telegraph Dispatch and Intelligence Co. v. McLean*, L. R. 8 Ch. 658, *ante*, p. 418.

The plaintiffs leased a coal-mine to the defendants at a minimum rent, to be increased in case there should be pits sunk on the estate, and the lessees covenanted to work the mine uninterruptedly, efficiently and regularly, according to the usual or most improved practice; *held*, that the lessee, who worked the mine by out-stroke, was not bound to sink pits, though that might be the most efficient way of working; *Wheatley v. Westminster Brymbo Coal Co.*, L. R. 9 Eq. 588.

See also *Sharp v. Waterhouse*, 7 El. & Bl. 816; *James v. Cochrane*, 7 Ex. 170; S. C., 8 Ex. 556; *Borrowes v. Borrowes*, 6 Ir. R. Eq. 368.

Recitals Creating Covenants.

A recital may create a covenant. See *ante*, p. 143.

"Where words of recital or reference manifested a clear intention that the parties should do certain acts, the Courts have from these inferred a covenant to do such acts;" *per* Lord Denman, C. J., *Aspdin v. Austin*, 5 Q. B. 688.

"There can be no question that a recital in a deed may amount to a covenant, but it must be plain upon the whole deed that it was so intended;" *per* Sullivan, M. R., *Borrowes v. Borrowes*, Ir. R. 6 Eq. 378.

It is not easy to state precisely what words in a recital amount to a covenant, but it has been held that:—

A recital that something is intended to be done amounts to a covenant to do that thing, and that

a recital of a state of facts amounts to a covenant that that state exists.

Examples.—Where the condition of a bond contained a recital that the plaintiff had covenanted with the defendant that it should be lawful for the defendant to cut wood for fire-bote without making waste or cutting more than necessary, and the condition was to perform all covenants and agreements, it was held, in an action by the plaintiff against the defendant for waste in felling wood, that the defendant was bound; *Stevinson's Case*, 1 Leon. 324, pl. 457; 12 East, 182 n.

Recital in lease of a mine, that before the sealing of the indenture it was agreed that the plaintiff should have the third part of the coals digged; *held*, to amount to a covenant to render them; *Barfoot v. Freswell*, 3 Keb. 465.

Recital in a mortgage, that it had been agreed between the mortgagor and mortgagee that the mortgagee should be at liberty to sign judgment in an action commenced against the mortgagor, "but that no execution shall issue thereon until this present security be realized;" *held*, to amount to a covenant by the mortgagee not to issue execution till the realization of the security; *Farrell v. Hilditch*, 5 C. B. N. S. 840.

Recital, in marriage articles, of an agreement to levy a fine, *held*, to amount to a covenant to levy it; *Hollis v. Carr*, Freem. Ch. 3; 2 Mod. 86; 3 Swan. 688.

In a marriage settlement there was a recital that the wife's father was desirous to give his daughter as a marriage portion such sum or child's share as he might be entitled to dispose of: and the intended husband, who had power to jointure to the amount of £10 per cent. on the fortune which he should receive with his wife, in consideration of the marriage and of the portion agreed to be paid as thereinbefore stated, appointed a jointure of £500 a-year, which was also collaterally secured on other lands not subject to the power; *held*, that the recital amounted to an absolute covenant by the father

that his daughter should have on his death an equal share of his personal estate with his other children ; *Duckett v. Gordon*, 11 Ir. Ch. R. 181.

Recital in a partnership deed, executed on the retirement of one partner, of an agreement, "that the debts and credits of the retiring partner shall be received and paid by the continuing partners;" *held*, to amount to a covenant by the continuing partners to pay the debts of the retiring partner ; *Saltoun v. Houstoun*, 1 Bing. 498.

Recital in marriage articles, that the defendant was to pay to the plaintiff £1000 for the marriage portion of the wife, *held* to amount to a covenant to pay that sum ; *Graves v. White*, Freem. Ch. 57.

Recital in a deed poll by A. that he was possessed of certain lands for years of a certain term, and that by good and lawful conveyance he assigned the same to B., with divers covenants, articles, and agreements in the said deed contained which are or ought to be performed on his part ; and the condition of the deed poll was to perform, &c. ; *held*, that, unless A. had that interest, the condition was forfeited ; *Severn and Clerke's Case*, 1 Leon. 122. See Rawle on Covenants, 479.

Recital in a lease of an agreement by the lessee with the lessor and other parties for pulling down an old mill and building another of larger dimensions, followed by a covenant to keep such new mill in repair and leave it at the end of the term ; *held*, that there was an implied covenant to build it ; *Sampson v. Easterby*, 9 B. & C. 505 ; 6 Bing. 644.

Recital in a creditors' deed that the debtor had agreed to pay a certain composition on his debts, followed by a release by the creditors ; *held*, to amount to a covenant to pay the composition ; *Lay v. Mottram*, 19 C. B. N. S. 479.

Recital that defendant had agreed to pay off certain mortgages and debts of W., and covenant by defendant to save harmless and indemnify against the payment of

the said debts; held, to amount to a covenant to pay the debts as well as to indemnify; *Carr v. Roberts*, 5 B. & Ad. 78.

Express cove-
nants super-
sede covenant
implied.

Bearing in mind Rule 19, (*ante*, p. 89), it will be evident that, if there be an express covenant to which the recital can be referred, the words of the express covenant must be taken to supersede the covenant which, in their absence, might have been implied from the recital; see *Young v. Smith*, L. R. 1 Eq. 180; 35 Beav. 87. And see *per* Jessel, M. R., *Dawes v. Tredwell*, 18 Ch. D. at p. 359, cited *ante*, p. 143.

Admission of
debt by
recital.

A mere admission of a debt by a recital (which may be contained in a deed poll, *Turner v. Wardle*, 7 Sim. 80), where the recital has no other object, implies a covenant for payment; *Brice v. Carre*, or *Curr*, 1 Lev. 47; 1 Keb. 155. See the dicta of Lord Cairns, C., in *Isaacson v. Harwood*, L. R. 3 Ch. 228, and of Romilly, M. R., in *Marryat v. Marryat*, 28 Beav. 226: and *per* Malins, V.-C., in *Jackson v. N. E. Ry. Co.*, 7 Ch. D. at p. 583, cited *ante*, pp. 143, 144.

But a recital does not so operate where it is made for some other purpose; *e.g.*, to show what is intended to be secured by the deed.

Accordingly, recitals that a debt is due in a conveyance in trust to secure it (*Jackson v. N. E. Ry. Co.*, 7 Ch. D. 578), or in a mortgage to secure it (*Isaacson v. Harwood*, L. R. 3 Ch. 225; *Marryat v. Marryat*, 28 Beav. 224), or in the transfer of a mortgage (*Courtney v. Taylor*, 6 M. & Gr. 851; 7 Sc. N. R. 749), or in an assignment for the benefit of creditors (*Ivan v. Elwes*, 3 Drew.

25), were not held to turn the debts into specialties. See also *Stone v. Van Heythusen*, Kay, 721 : but see *Lay v. Mottram*, 19 C. B. N. S. 479.

In *Cheslyn v. Dalby*, 4 Y. & C. Ex. 288, the recital was taken to amount to a covenant to pay, although it had another object also.

* If the recital be followed by an agreement to execute a mortgage "including all powers, covenants, and clauses incidental and necessary thereto," the debt is a specialty ; *Saunders v. Milsome*, L. R. 2 Eq. 578.

Where a deed of assignment contained a recital of an agreement for the transfer of certain property "for the sum of £1000," followed by the usual acknowledgment of the receipt of the £1000, which, however, was not in fact paid, it was held that no covenant to pay the £1000 could be implied in the face of the acknowledgment ; *Morgan's Patent Anchor Co. v. Morgan*, 35 L. T. 811. Amplett, B., said : "The question is whether, as the deed stands, a court of law can say that there is by implication a covenant to pay a certain sum of money, when the same deed says that the money has been already paid. I do not think that it can."

Participle—"To be."

In several cases a clause introduced by a participle or the words "to be," has been held to amount to a covenant (a). See Platt on Covenants, 99, *et seq.*, and *post*, p. 464.

Examples.—"Yielding and paying" rent has been held to amount to a covenant to pay it ; see Platt on Covenants, Ch. 2 ; *Harper v. Burgh*, 2 Lev. 206 ; S. C. *sub nom. Harper v. Bird*, T. Jo. 102 ; *Webb v. Russell*, 3 T. R. at p. 402 ; *Vyryan v. Arthur*, 1 B. & C. 410 ;

(a) This covenant may qualify another covenant, see *post*, p. 465.

Iggulden v. May, 9 Ves. at p. 380; *Newton v. Osborn*, Sty. 387; *Porter v. Swetnam*, Sty. 406; *Hellier v. Casbard*, 1 Sid. 240, 266.

"Rendering." "Rendering" rent free and "clear from all manner of taxes, charges, and impositions whatsoever, *held* to amount to a covenant to pay the rent free from all taxes, &c.; *Giles v. Hooper*, Carth. 185.

"Subject to" payment. But an assignment of a lease "subject" to the payment of the rent and performance of the covenants in the lease by the assignee did not imply a covenant by the assignee to indemnify the assignor against the rent; *Wolveridge v. Steward*, 1 Cr. & M. 644 (*i. e.* after the assignee had assigned over).

Excepting. Lease of a house "excepting two rooms and free passage to them." The assign of the lessee disturbed the lessor in the passage; held that he was liable on an action of covenant; *Bush v. Cole* or *Coles*, Carth. 232; 12 Mod. 24; S. C., sub nom. *Bush v. Calis*, 1 Show. 388; *Cole's Case*, 1 Salk. 196.

"Being." Covenant by lessee "to repair and glaze the windows of the messuage and also the hedges, ditches, &c.; the said farmhouse and buildings being previously put in repair and kept in repair by" the lessor; *held*, to amount to a covenant by the lessor to put into repair; *Cannock v. Jones*, 8 Ex. 238.

"Slates being found, allowed, and delivered on the premises by A.;" *held*, to amount to a covenant by A. to deliver them; *Mucklestone v. Thomas*, Willes, 146.

"Doing," &c. "Doing, fulfilling, and performing;" *Boone v. Eyre*, 2 W. Bl. 1812. "Doing suit to the mill;" *Vyryan v. Arthur*, 1 B. & C. 410.

"To be." "To be paid;" *Bower v. Hodges*, 13 C. B. 765.

Clause introduced by participle qualifying preceding covenant.

But a clause introduced by a participle, or the words "to be," may amount only to a qualification of the covenant with which it is connected.

Examples.—Covenant by lessee to repair, "the lessor allowing and assigning timber for repairs;" *held*, to amount to a qualification of the covenant to repair; *Thomas v. Cadwallader*, Willes, 496.

Covenant by lessee not to assign without the lessor's consent, "such consent not being arbitrarily withheld;" *Treloar v. Bigge*, L. R. 9 Ex. 151; "not to be unreasonably withheld;" *Sear v. House Property and Investment Society*, 16 Ch. D. 887; *held*, that the words amounted only to a qualification of the covenant by the lessee.

Breach of Trust.

A breach of trust, of itself, creates a simple contract debt only (*Vernon v. Vawdry*, 2 Atk. 119; *Cox v. Bateman*, 2 Ves. Sen. 19; Lewin on Tr. 7th ed. 189); but the question has been much discussed whether the execution by the trustee of the deed by which he is made a trustee, operates to make the debt a specialty. Breach of trust, when specialty debt.

It is now decided that, where the deed merely contains an appointment of a man as trustee, and a declaration by him that he accepts the office of trustee, no covenant on his part will be implied, and a breach of trust will not create a specialty; *Adey v. Arnold*, 2 De G. M. & G. 482; *Wynch v. Grant*, 2 Drew. 812; *Holland v. Holland*, L. R. 4 Ch. 449; see also *Isaacson v. Harwood*, L. R. 8 Ch. 225; *Newport v. Bryan*, 5 Ir. Ch. R. 119; but that, on the other hand, if the deed contain a declaration of trust (*Benson v. Benson*, 1 P. Wms. 130; *Gifford v. Manley*, Forr. Ca. t. Talb. 109; *Cummins v. Cummins*, 8 Jo. & Lat. 64; *Wood v. Hardisty*, 2 Col. 542; *Mavor v. Davenport*, 2 Sim. 227; *Norris v. Sadleir*, I. R. 8 Eq. 160, 519) a breach of trust amounts to a specialty, even

if the declaration of trust be contained in a deed poll (*Turner v. Wardle*, 7 Sim. 80); unless the trustee do not execute the deed, though he may act under it; *Richardson v. Jenkins*, 1 Drew. 477.

Covenants in Law (a).

"A covenant in law, properly speaking, is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate; so that, after they have had their primary operation in creating the estate, the law gives them a secondary force, by implying an agreement on the part of the grantor to protect and preserve the estate so by those words already created: as, if a man by deed demise land for years, covenant lies upon the word 'demise,' which imports or makes a covenant in law for quiet enjoyment; or, if he grant land by feoffment, covenant will lie upon the word 'dedi;'" *per Cur., Williams v. Burrell*, 1 C. B. 429.

"Demise"
covenants
created by
word.

By the word "demise" two covenants are implied; *Burnett v. Lynch*, 5 B. & C. at p. 609; *Line v. Stephenson*, 6 Sco. 447; S. C., 7 Sco. 69; *Kean v. Strong*, 9 Ir. L. R. 74; the one that the lessor has power to create the term (*Holder v. Taylor*, Hob. 12; *Fraser v. Skey*, 2 Chit. 646); the other that the lessee shall have quiet enjoyment (*Nokes's Case*, 4 Rep. 80b; *Spencer's Case*, 5 Rep. 16a; S. C., 1 Sm. L. C. 8th ed.; *Style v. Hearing*, Cro. Jac. 78; *Iggulden v. May*, 9 Ves. at p. 880; *Hall v. City of London Brewery Co.*, 2 B. & S. 787) during such part of the term as shall elapse while the lessor's interest continues; *Cheiny and Langley's Case*, 1 Leon. 179; *Swan v. Stransham, or Searles*, Dy. 257a; S. C., F.

(a) As to the statutory covenants implied in a conveyance for value by a person conveying "as beneficial owner," in a settlement by a person conveying "as settlor," and in any conveyance by a person conveying "as trustee," &c., see the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7. As to implied covenants generally, see Platt on Covenants, Pt. 1, Ch. 2, s. 3.

Moo. 74; And. 12; Benl. 150; and see Platt, Cov. 46, 47; *Adams v. Gibney*, 6 Bing. 656.

That they are not express covenants, see *Smith v. Pocklington*, 1 Cr. & Jer.*445, where it was held, that on a demise by A., the legal, and B. the equitable owner, B. could not be sued in covenant on an eviction.

That the word “let,” or any equivalent word, has the “Let,” same effect as “demise,” see *Hart v. Windsor*, 12 M. & W. 68, 85, cited by Brett, J., in *Mostyn v. West Mostyn Coal Co.*, 1 C. P. D. at p. 152.

The old doctrine as to the covenants arising at law by the use of the words “give” and “grant” will be found discussed at length by Mr. Butler, Co. Lit. 884a, note (1); but these words, when used in a deed executed after the 1st October, 1845, do not imply any covenant, except so far as they may do so by virtue of some statute; see 8 & 9 Vict. c. 106, s. 4. Mr. Dart (V. & P. 5th ed., 562) “Give”—says, “The object of this enactment appears to have “Grant,” been to prevent any *general* warranty of title from arising by the use of the words ‘give’ and ‘grant;’ and it probably would not be held to interfere with the rule of law that any words of assurance operate as a covenant for quiet enjoyment of the interest expressed to be assured as against the future acts of the party making the assurance.” The exceptions seem to be the words “grant, bargain, and sell,” in bargains and sales of hereditaments in Yorkshire registered under 6 Anne, c. 35, ss. 30 and 34, and 8 Geo. 2, c. 6, s. 35 (b); the word “grant” in a conveyance by the promoters of an undertaking under the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), s. 182, which is equivalent to covenants for title unless limited by express covenant; and a conveyance by a joint-stock company under 19 & 20 Vict. c. 47, s. 46, which is to imply the ordinary covenants for title, unless the implication be expressly negatived.

(b) These Acts are repealed by the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54); amended by 48 Vict. c. 4.

Assignment
implying
covenant.

In some cases an assignment has been held to imply a covenant by the assignor not to do any thing to prevent the assignee from having the full benefit of the assignment.

Examples.—A. “sells, assigns, and transfers” to B. a debt due to A. from C.; *held*, that these words amounted to a covenant by A. not to prevent B. from receiving the debt; *Deering v. Farrington*, 1 Mod. 113; S. C., 8 Keb. 804; *Freem. K. B.* 367.

A. & B. as co-partners assigned the stock-in-trade of, and the debts due to, the partnership to C.; at the date of the assignment a bill of exchange belonging to the partnership was payable to the order of A.; afterwards he made default in transferring it to C. and incapacitated himself from doing so; *held*, that there was an implied covenant by A. not to do anything in derogation of his own grant, and that he had therefore committed a breach of covenant; *Aulton v. Atkins*, 18 C. B. 249. See also *Gerard v. Lewis*, L. R. 2 C. P. 805.

Assignment of an apprentice is a good covenant by the first master with the second, that he shall serve his time with him, though it is not an assignment by way of interest; *Caister v. Eccles*, 1 Ld. Raym. 688.

See 2 Platt on Leases, p. 40; Platt, Cov. 468.

Express cove-
nants exclude
implication.

Rule 152.—Where a deed contains express covenants, no implication of any other covenants on the same subject-matter can be raised. See Rule 19, *ante*, p. 89.

“Demise,”
implied cove-
nant negatived.

The implication of a covenant for quiet enjoyment from the word “demise” may be rebutted by an express covenant for quiet enjoyment, even if it be restricted; *Nokes’s Case*, 4 Rep. 80; *Line v. Stephenson*, 4 Bing. N. C. 678; S. C., 5 Bing. N. C. 188; 6 Sco. 447; 7 Sco. 69; *Merrill v. Frame*, 4 Taunt. 329; *Stannard v. Forbes*, 6

Ad. & El. 572. See *Nokes's Case* discussed *Proctor v. Johnson*, 1 Buls. 2; S. C., 2 Brownl. 212; Cro. El. 809; Cro. Jac. 288; Yelv. 175. See 2 Platt on Leases, 285.

The implication of a covenant from the word "grant" So "grant." was rebutted by an express covenant in *Clarke v. Samson*, 1 Ves. Sen. 100.

No implied contract to repair arises out of the relation of landlord and tenant, where the tenant holds under an express contract which provides for the very matter; *per Lord Denman, C. J., Standen v. Christmas*, 10 Q. B. at p. 141. See Woodfall, L. & T. (12th ed.) 569.

Rule 153.—An agreement under seal to execute a deed which ought to contain certain covenants, operates as a covenant to perform such covenants. Agreement for deed containing covenants.

Examples.—A., being indebted to B., on simple contract, executed a deed whereby he charged certain property with the payment of the debt, and agreed to execute such a mortgage of the property, with "all powers, covenants, and clauses incidental thereto," as B. should require; *held*, that the debt was converted into a specialty, on the ground that the mortgage would contain a covenant for the payment of the debt; *Saunders v. Milsome*, L. R. 2 Eq. 573.

Agreement by deed to execute a lease which should contain a covenant to keep the premises in good and substantial repair, and all other usual covenants, and the lessee covenanted to accept the lease and execute a counterpart; *held*, in an action by the lessor, that sums due for arrears of rent and dilapidations were specialty debts; *Kidd v. Boone*, L. R. 12 Eq. 89.

It follows from Rule 21 (p. 93) that:—

Rule 154.—Ambiguous words in a covenant are Construction

against the
covenantor,

to be taken most strongly against the covenantor ;
Fowle v. Welsh, 1 B. & C. at p. 35.

See also *Barton v. Fitzgerald*, 15 East, 580 ; *Webb v. Plummer*, 2 B. & Ald. 746 ; *Barrett v. Bedford*, 8 T. R. 602 ; per Bayley, J., *Shrewsbury v. Gould*, 2 B. & Ald. at p. 487 ; per Willes, J., *Rubery v. Jervoise*, 1 T. R. at p. 284 ; per Le Blanc and Bayley, J.J., *Love v. Pares*, 13 East, at pp. 85, 86 ; *Warde v. Warde*, 16 Beav. 103. But this rule " must be qualified by the observation that a due regard must be paid to the intention of the parties as collected from the whole context of the instrument ; " per Lord Eldon, C. J., *Browning v. Wright*, 2 Bos. & P. at p. 22. See also per Lord Ellenborough, C. J., *Sicklemore v. Thistleton*, 6 M. & S. at p. 12.

"It is hereby
agreed and
declared" (c).

Rule 155.—Where, in a clause commencing "it is hereby agreed and declared," it is stated that a person is to do a thing, he alone is bound to do it.

"It appears to me that in effect the words 'it is hereby agreed and declared' operate thus: they operate to show that what is comprised in the clause of which these words are the commencement, is what all parties intend and agree shall be done; and whatever you find in the clause is agreed to be done by any given party, it is an agreement that that party is to do it; but the party who is to do the thing is the person who is alone bound to perform that agreement;" per Kindersley, V.-C., *Ramsden v. Smith*, 2 Drew. 307, 308. See also *Pordage v. Cole*, 1 Wms. Saund. 319 (ed. 1871, vol. 1, p. 548); *Wood v. Copper Miners*, 7 C. B. 906; *Willoughby v. Middleton*, 2 J. & H. 344. See also per Jessel, M. R., *Dawes v. Tredwell*, 18 Ch D. at p. 359.

Where a person by deed "declares" that he will do a thing, it amounts to a covenant by him to do it; *Richardson v. Jenkins*, 1 Drew. 477 (see 482, 483).

Rule 156.—An exception to an absolute covenant is construed strictly. Exception to covenant.

Example.—Where a tenant in tail, with reversion in the Queen, covenanted against the acts of persons except the Queen, her heirs or successors, *existentibus regibus vel reginis Angliæ*, an eviction by a patentee of the Queen was held to be a breach of the covenant; *Woodroff v. Greenwood*, Cro. Eliz. 518.

Rule 158.—If there is a personal covenant, followed by a proviso that the covenantor is not to be liable under the covenant, the proviso is repugnant and void; but where the proviso limits the personal liability under the covenant, without destroying it, the proviso is valid; *Furnivall v. Coombes*, 5 Man. & Gr. 736; S. C. 6 Scott, N. R. 522 (see *per Keating*, J., L. R. 2 C. P. 186); *Williams v. Hathaway*, 6 Ch. D. 544. See Pollock on Contr., (3rd ed.), 119, n. (c); Addison on Contr. (8th ed.), 185 (citing *Re State Fire Insurance Co.*, 32 L. J. Ch. 300), a case of a bill of exchange. Proviso limiting liability in covenant.

And “no evidence could exclude personal liability in the defendants, if the written document itself makes them liable;” *per Byles*, J., *Kelner v. Baxter*, L. R. 2 C. P. 182.

Effect of Penalty.

“There is a difference between covenants in general and covenants secured by a penalty or forfeiture. In the latter case the obligee has his election; he may either bring an action of debt for the penalty and recover the penalty (after which recovery of the penalty he cannot resort to the covenant, because the penalty is to be a satisfaction for the whole); or if he does not choose to go

upon the penalty he may proceed upon the covenant and recover more or less than the penalty *toties quoties*;" *per* Lord Mansfield, C. J., *Lowe v. Peers*, 4 Burr. at p. 2228.

Penalty or Damages.

Penalty or damages, question of construction.

Rule 159.—The question whether a sum named to be paid on non-performance of a covenant is a penalty, or liquidated damages, depends on the construction of the whole deed.

See 1 Swanst. Rep. 318, note; 2 Wh. & Tud. L. C. Eq. (5th ed.), 1128 *et seq.*

The use of the words "liquidated damages" or "penalty" in describing the nature of the payment, is not conclusive; *Gerrard v. O'Reilly*, 8 Dr. & War. 414; *Kemble v. Farren*, 6 Bing. 141; *Betts v. Burch*, 4 H. & N. 506; and *per* Fry, J., *Wallis v. Smith*, 21 Ch. D. at p. 249; *Dimeck v. Corlett*, 12 Moore, P. C. C. 199; and cases cited Kerr, Inj. 410; 2 Wh. & Tud. L. C. Eq. (5th ed.), 1127; Fry, Sp. Perf. 55.

Sometimes the sum is stated to be "a penalty to be recovered as liquidated damages;" *Davies v. Penton*, 6 B. & C. 216; *Boys v. Ansell*, 5 Bing. N. C. 390 (case of an instrument not under seal); *Legg v. Harlock*, 12 Q. B. 1015; or is called "penalty" and "liquidated damages" in the same sentence: but this does not affect the construction.

Difference as to amount recoverable.

Observation.—Where the covenantee sues for compensation for breach of such a covenant, (1) if the sum named is held to be a penalty he will recover such damages, be they more or less than the amount of the penalty, as he has actually sustained, 8 & 9 Will. 3, c. 11, s. 8; but (2) if the sum named is held to be liquidated damages, he will recover that sum without reference to the damages actually sustained, as in this case the parties have themselves assessed the damages; see *Gainsford v. Griffith*, 1 Wms. Saund. 51 (edit. 1871, vol. i. p. 67).

Rule 160.—Where there are covenants to do a number of things, and one and the same sum is made payable on breach of any one covenant, whether important or unimportant, then the sum will be regarded as a penalty; 1 Wms. Saund. 58, n. (d), (ed. 1871, vol. i., p. 72). *Lea v. Whitaker*, L. R. 8 C. P. 70; *Magee v. Lavell*, L. R. 9 C. P. 107; *Re Newman*, 4 Ch. D. 724; *Browne v. Phillips*, 10 L. R. Ir. 212; but consider *Wallis v. Smith*, 21 Ch. D. 243.

Examples (1).—Where the stated sum was held to be liquidated damages.—*Rolfe v. Peterson*, 2 Br. P. C., 436; *Lowe v. Peers*, 4 Burr. 2225; *Fletcher v. Dycke*, 2 T. R. 32; *Reilly v. Jones*, 1 Bing. 302; S. C., 8 Moore, 244; *Leighton v. Wales*, 3 M. & W. 545; *Green v. Price*, 13 M. & W. 695; S. C., 16 M. & W. 346; *Galesworthy v. Strutt*, 1 Ex. 659; *Atkyns v. Kinnier*, 4 Ex. 776; *Sainter v. Ferguson*, 7 C. B. 716; *Mercer v. Irving*, El. Bl. & El. 568; *Reynolds v. Bridge*, 6 El. & Bl. 528; *Sparrow v. Paris*, 7 H. & N. 594; *Cruz v. Aldred*, 14 W. R. 656; *Hinton v. Sparkes*, L. R. 3 C. P. 161; *Catten v. Bennett*, 51 L. T. 70; *Lea v. Whitaker*, L. R. 8 C. P. 70; *Wallis v. Smith*, 21 Ch. D. 243; *Mexborough v. Wood*, 47 L. T. 516.

Examples (2).—Where the stated sum was held to be a penalty.—*Hardy v. Martin*, 1 Br. C. C. 419 (note); S. C., 1 Cox, 26; see the comments of Lord Eldon, C. J., 2 Bos. & P. at p. 352; *Astley v. Weldon*, 2 Bos. & P. 346; *Smith v. Dickenson*, 3 Bos. & P. 680; *Sloman v. Walter*, 1 Br. Ch. 418; *Harrison v. Wright*, 13 East, 348; *Davies v. Penton*, 6 B. & C. 216; *Charrington v. Laing*, 6 Bing. 242; *Kemble v. Farren*, 6 Bing. 141; *Boys v. Ancell*, 7 Scott, 364; 5 Bing. N. C. 390; *Horner v. Flintoff*, 9 M. & W. 678; *Betts v. Burch*, 4 H. & N. 506; *Reindell v. Schell*, 4 C. B. N. S. 97; *Magee v. Lavell*, L. R. 9 C. P. 107; *Browne v. Phillips*,

10 L. R. Ir. (Ex. D.) 212; *Re Newman*, 4 Ch. D. 725.

Exception.—The Rule does not apply if the contract specify the particular stipulation or stipulations to which the liquidated damages are to be referred; *per* Tindal, C. J., *Kemble v. Farren*, 6 Bing. 147.

Specific Performance.

Covenant with
penalty.

A question sometimes arises whether a covenant to do or not to do a particular act, subject to a penalty or liquidated damages for omitting or doing it, is to be construed as a covenant to do or not to do that act, or only as a covenant that, if the act be omitted or be done as the case may be, the penalty or liquidated damages shall be paid; in other words, whether you can obtain specific performance or an injunction to enforce or prevent the doing of the act, or only recover the penalty, or liquidated damages if it be omitted or done. See the subject discussed in Fry on Specific Performance, Chap. 8, pp. 52 *et seq.* (2nd ed.); where it is said (§ 115): "The question always is, What is the contract?—is it that one certain act shall be done, with a sum annexed whether by way of penalty or damages to secure the performance of this very act? or is it that one of the things shall be done at the election of the party who has to perform the contract, namely, the performance of the act or the payment of the sum of money?" See also Joyce on Doctrine and Principle of Injunctions, 86 *et seq.*; Kerr on Injunctions, 2nd ed. 409 *et seq.*

When a covenant is made, the object of which is secured by a penalty must be performed specifically.

Rule 161.—If there be a covenant with a penalty or liquidated damages to be paid on breach of the covenant, the covenant is not to be broken; but if there be a covenant, with a provision that it is not to be broken unless on payment of a penalty or

damages, the covenant may be broken on payment of the penalty or damages; Fry on Specific Performance (2nd ed.), 52, *et seq.*

“There are three classes of covenants: First, covenants not to do particular acts, with a penalty for doing them, which are within the statute 8 & 9 Will. 3, c. 11 (d); secondly, covenants not to do an act, with liquidated damages to be paid if the act is done, which are not within the statute; and thirdly, covenants that an act shall not be done unless subject to a certain payment;” *per* Bramwell, B., *Legh v. Lillie*, 6 H. & N. at p. 171.

“The declaration sets out a covenant by the defendant that he will not sell or carry away from the demised premises any manure, &c., without the consent in writing of the plaintiff, under the increased rent of £10 for every ton so carried away. Now there are various forms in which a covenant of this sort may be expressed; a man may covenant simply that he will not do such an act, or that if he does he shall pay a penalty, or that if he does any such act he shall pay liquidated damages.* Had the covenant been in either of these forms, it would have been substantially a covenant not to do the act, with a subsequent covenant that if he did it he should pay a penalty or liquidated damages. But the covenant in this case is not in either of these forms. It is a single covenant, not two covenants, that the covenantor will not remove manure, under an increased rent of £10 for every ton carried away. The word ‘rent’ points not only to the injury to the covenantee, but to the benefit the covenantor may derive from doing the act which is prohibited. It is on that ground, amongst other reasons, that I think that the meaning is that the covenantor may remove manure if he chooses to pay the increased rent;” *per* Wilde, B., *Legh v. Lillie*, 6 H. & N. at p. 173.

“The terms of the lease are, that the party will not do the act under a penalty; therefore it is a covenant against doing the act, and a stipulation that,

(d) *I.e.*, the damages for breach must be determined by the jury.

if he shall do it, he is to pay a particular sum per acre. The general rule of equity is, that if a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done. If a man, for instance, agree to settle an estate and execute his bond for £600, as a security for the performance of his contract, he will not be allowed to pay the forfeit of his bond and avoid his agreement, but he will be compelled to settle the estate in specific performance of his agreement. So if a man covenant to abstain from doing a certain act, and agree that if he do it he will pay a sum of money, it would seem that he will be compelled to abstain from doing that act, and, just as in the converse case, he cannot elect to break his engagement by paying for his violation of the contract. This I apprehend is the general rule of equity. It is so laid down by Lord Hardwicke in *Howard v. Hoplyns*, 2 Atk. 371, and by Lord Thurlow in *Sloman v. Walter*, 1 Bro. C. C. 418: as far as relates to settlements, the rule was established by *Chilliner v. Chilliner*, 2 Ves. Sen. 528, which was followed in the very imperfectly reported case of *Logan v. Wienholt*, 1 Cl. & Fin. 611, and also in *Roper v. Bartholomew*, 12 Pri. 796, and again in *Hardy v. Martini*, 1 Cox, 26. Now from all these cases it appears, that the question for the Court to ascertain is, whether the party is restricted by covenant from doing the particular act, although if he do it a payment is reserved, or whether, according to the true construction of the contract, its meaning is, that the one party shall have a right to do the act on payment of what is agreed upon as an equivalent"; per Sugden, C., *French v. Macale*, 2 Dr. & War. 274.

Examples where the covenant was to be performed specifically.—Covenants in restraint of trade, *Barret v. Blagrove*, 5 Ves. 555; *Hardy v. Martin*, 1 Cox, 26; *Clarkson v. Edge*, 38 Beav. 227; *Fox v. Scard*, 38 Beav. 327; *Bird v. Lake*, 1 H. & M. 111; *Gravelly v. Barnard*, L. R. 18 Eq. 518; *Jones v. Heavens*, 4 Ch. D. 686; *Weston v. Managers of Metropolitan District Asylum*,

8 Q. B. D. 887; S. C., 9 Q. B. D. 404; *Howard v. Woodward*, 84 L. J. Ch. 47, as to building, *Coles v. Sims*, 5 De G. M. & G. 1 (on app. from Kay, 56; where the case is incorrectly stated); to grant a lease, *Butler v. Powis*, 2 Coll. 157; to settle land, *Nandike v. Wilkes*, Gilb. Eq. Rep. 114; *Chilliner v. Chilliner*, 2 Ves. Sen. 528; *Prebble v. Boghurst*, 1 Swanst. 809; *Roper v. Bartholomew*, 12 Pri. 797; to leave property by will, *Logan v. Wienholt*, 1 Cl. & Fin. 611; S. C., 7 Bl. N. S. 1; to pay an annuity of variable amount as part of a family arrangement, *Jeudwine v. Agate*, 8 Sim. 129; not to "burn" the demised premises, *French v. Macale*, 2 Dr. & War. 269; S. C., 1 Car. & L. 459.

Examples where specific performance was not enforced of a covenant the performance of which was secured by a named sum.—Covenant in restraint of trade, *Saunter v. Ferguson*, 1 Mac. & Gor. 286; to renew a lease, *Magrans v. Archbold*, 1 Dow, 107; not to plough pasture land, *Woodward v. Gyles*, 2 Vern. 119; *Rolfe v. Peterson*, 2 Br. P. C. 436.

CHAPTER XXVIII.

COVENANTS WHETHER JOINT OR SEVERAL.

Liability, whether joint or several—Several liability under a covenant joint in form—Liability under covenants implied in law—Benefit of covenant whether joint or several—Where one of several covenantees has no beneficial interest.

The liability on and benefit of covenants may be joint or several or both (a).

If there are two or more covenantors, they may bind themselves jointly, or severally, or both jointly and severally; in other words, the liability of the covenant may be either joint, or several, or both joint and several. And if there are two or more covenantees, the covenant may be entered into with them jointly, or severally, or both jointly and severally; but in this case, however the covenant may be framed, it cannot enure to the benefit of the covenantees both jointly and severally. The object of this chapter is to state whether the liability is joint, or several, or both joint and several; and whether the benefit is joint or several, in cases where the covenant is ambiguous, or where the circumstances of the parties alter its apparent meaning.

Liability whether Joint or Several.

Rule 162.—Where a liability is created by covenant, the liability will be construed as joint, or

(a) As to the parties to sue, see Rules of the Supreme Court, 1883, Order XVI, rule 1, and Order XVIII., rule 6; as to the parties to be sued, see Order XVI, rule 4; as to covenants in leases made since 1881, see the Conv. Act, 1881, ss. 10, 11, 12. And as to covenants with two or more jointly made since 1881, see s. 6d.

several, or both joint and several, according to the ^{altered by cir-} express words (b), where they are unambiguous; ^{cumstances.} but where they are ambiguous, the liability will depend upon the interests of the covenantors in the property, or other circumstances of the parties.

Corollary.—Where a separate liability existed before the covenant, a covenant joint only in form will be construed (formerly in equity only) as separate also. See Leake on Contracts, p. 458.

Examples (1) where the express words created a ^{Liability joint, under express words.} **joint liability.**—Joint covenant given by continuing partners to a retiring partner for indemnity (*Sumner v. Powell*, 2 Mer. 30; S. C., 1 Turn. & Russ. 428); or to pay specified sums to him; *Wilmer v. Curry*, 2 De G. & Sm. 347. Lease to partners of a house in which they carried on their business, containing joint covenants by them; *Clarke v. Bickers*, 14 Sim. 689. Lease to C., containing covenants by C. and D. to repair, &c., *Copland v. Lapport*, 3 A. & E. 517. See the remarks on *Wilmer v. Curry* by Jessel, M. R., *Beresford v. Browning*, 20 Eq., at p. 576.

Examples (2) where the express words created ^{Liability several, under express words.} **several liability.**—"Convenient separation;" *Mathewson's Case*, 5 Rep. 22b. A, as principal, and B., C., and D., as sureties, executed a bond in the form: "We, A., B., C., and D., are held and firmly bound to E. in the sum of £50 each, to be paid to E., his executors, &c.; to which payment we hereby bind us and each of us, our and each of our heirs, executors, and administrators, and every of them." *Held*, that the bond was the separate bond of each obligor, binding each to pay the sum of £50; and therefore the payment of £50 by B. was no answer to an action on the bond against C.; *Armstrong v. Cahill*, 6 L. R. Ir.

(b) Where several covenantors covenant, each as to his own acts and defaults only, the effect is the same as if each had executed a separate deed on the same parchment; *Mathewson's Case*, 5 Rep. 23 (a); S. C., sub nom. *Mathewson v. Lydiatt*, Cro. El. 408, 470, 516.

440, where Harrison, J., distinguished *Collins v. Prosser*, 1 B. & C. 682, and relied on the word "each;" see also *ex parte Harding*, 12 Ch. D. 557.

Liability joint and several under express words.

Examples (3) where the express words created a joint and several liability.—"Pro se et quolibet eorum;" *Robinson v. Walker*, 1 Salk. 398; S. C., 7 Mod. 154. "Se et quemlibet eorum;" *Bolton v. Lee*, 2 Lev. 56; S. C., 8 Keb. 89, 50. "Nos vel quemlibet nostrum;" *Hankinson v. Sandilands*, 1 Brownl. 121. "For themselves and either of them;" *Enys v. Donnithorpe*, 2 Burr. 1190. "For themselves and every of them;" *May v. Woodward*, Freem. K. B. 248. See also *Church v. King*, 2 My. & Cr. 220; *Tippins v. Coates*, 18 Beav. 401.

Liability joint in form held several under the circumstances.

Examples of the corollary.—The deed of assignment of a bankrupt contained a joint covenant by the assignees to account for "such money as they or either of them" should receive. *Held*, that they were jointly and severally bound; *Primrose v. Bromley*, 1 Atk. 89. A partnership deed contained an agreement that on the death or retirement of any partner the balance, as ascertained at the last stocktaking, due to him should be repaid by instalments by the surviving or continuing partners. *Held*, that the liability of the partners was joint and several; *Beresford v. Browning*, 20 Eq. 564; S. C., 1 Ch. D. 80. See 1 Lindley on Partnership, 869; *Kendall v. Hamilton*, 4 App. Cas. 504.

Liability under Covenants implied in Law.

Covenants implied in law.

If a demise be made by more than one person, the covenant implied by the word "demise," *ante*, p. 422, for right to demise is joint, while the covenant implied for quiet enjoyment is several; *Coleman v. Sherman*, Comb. 168; S. C., 1 Salk. 137; S. C., Carth. 97, but they must both actually demise; if one demise and the other confirm the covenant for right to demise is not joint; *Smith v. Pockington*, 1 C. & J. 445; 1 Tyr. 809.

In *Rex v. Great Wakering*, 5 B. & Ad. 971, where a

house was demised to two for a term at a rent, with a covenant by them jointly and severally for payment of taxes, &c., but there was no express covenant for payment of rent, it was held that the rent was payable by the two jointly, though one occupied the whole house and had paid the whole rent for five years.

Benefit of Covenant whether Joint or Several.

Where the words of a covenant with several are clear and unambiguous, the question whether the benefit of the covenant is to enure to the covenantees jointly or to each covenantee separately is to be determined solely by these words without reference to the interests of the covenantees in the subject-matter of the covenant; but where the words are ambiguous the following rule of construction is applied:—

Whether benefit of covenant with several is joint or several.

Rule 163.—Where a covenant with several covenantees is so expressed as to render it doubtful whether the benefit of it is to enure to them jointly or to each of them separately, the benefit will enure to them jointly or to each of them separately, according as their interest in the subject-matter of the covenant is joint or several, but it will not enure to the benefit of them both jointly and severally. See Leake on Contracts, 457.

Benefit of covenant joint or several according to interest of covenantee.

Observation.—By apt words, distinct covenants may be created, one with the covenantees jointly, and the other with each of them separately. See per Rolfe, B., *Keightley v. Watson*, 8 Ex. at p. 726; and per Parke, B., *Bradburne v. Botfield*, 14 M. & W. at p. 572.

It was formerly supposed to be a rule of law that the covenant must be taken as joint or several according to the interest of the covenantees; see *Slingsby's Case*, 5 Rep. 18 b; *Eccleston v. Clipsham*, 1 Wms. Saund. 153 (vol. i. p. 162, ed. 1871); but the true doctrine, which was first

Rule is one of construction not of law.

laid down by Mr. Preston (Shep. Touch. 166), is that the rule is one of construction only.

"I think the rule is plain and certain, and requires no authority; it is correctly stated by Mr. Preston in the passage in Shep. Touch. (p. 166). Where the words of a covenant are in their nature ambiguous, so that they may be construed either way, then the deed in which they are inserted supplies the mode of their construction. If it exhibit a several interest in the parties, you may construe it as a several covenant, and *vice versa*. But there is no rule to say that words which are expressly a joint covenant by (c) several persons shall be construed as a several covenant, unless there is something to lead to that construction. Where there are several parties, if the interest is joint, the covenant is construed as a joint covenant. If a party covenants with A. & B. to do something for B., and the words themselves are otherwise free from ambiguity, it must be a joint covenant;" *per* Abinger, C. B.; *Sorsbie v. Park*, 12 M. & W. at p. 156; S. C., 13 L. J. Ex. 9.

"I think the correct rule is laid down by Gibbs, C. J., in *James v. Emery* (5 Price, 538; S. C., 2 J. B. Mo. 195), with the qualification stated by Mr. Preston in the note in Shep. T. 166. That rule is that a covenant will be construed to be joint or several according to the interest of the parties appearing upon the face of the deed, if the words are capable of that construction; not that it will be construed to be several by reason of several interests if it be expressly joint;" *per* Parke, B., *Sorsbie v. Park*, 12 M. & W. at p. 158.

In *Keightley v. Watson*, 8 Ex. 721; S. C., 18 L. J. Ex. 899; Pollock, C. B., says, "I consider that the inquiry really is as to the true meaning of the covenant, at the same time bearing in mind the rule—a rule which I am by no means willing to break in upon—that the same covenant cannot be treated as joint or several at the option of the covenantee. If a covenant be so constructed

as to be ambiguous, that is, so as to serve either the one view or the other, then it will be joint, if the interest be joint, and it will be several if the interest be several. On the other hand, if it be in its terms unmistakably joint, then, though the interest be several, all the parties must be joined in the action. So, if the covenant be made clearly several, the action must be several, though the interest be joint. It is a question of construction." In the same case *Parke, B.* (at p. 722) says:—"The rule that covenants are to be construed according to the interest of the parties, is a rule of construction merely, and it cannot be supposed that such a rule was ever laid down as could prevent parties, whatever words they might use, from covenanting in a different manner. It is impossible to say that parties may not, if they please, use joint words, so as to express a joint covenant, and thereby to exclude a several covenant, and that, because a covenant may relate to several interests, it is therefore necessarily not to be construed as a joint covenant. If there be words *capable of two constructions*, we must look to the interest of the parties which they intended to protect, and construe the words according to that interest." And *Rolfe, B.*, at p. 726, says, "It appears to me that Mr. Preston's suggestion was perfectly well founded, that the rule in *Slingsby's Case* (5 Rep. 18 b) was not a rule of law but a mere rule of construction." See further on this point, 1 Wms. Saund. ed. 1871, p. 165, note (c) to *Eccleston v. Clipsham*; *Haddon v. Ayres*, 1 El. & El. 118; *Bradburne v. Botfield*, 14 M. & W., at p. 572; *Beer v. Beer*, 12 C. B., at p. 78, *per Maule, J.*

Examples (1) where the covenants enured to the benefit joint benefit of the covenantees jointly.—Agreement under seal by fiddlers that they would not play asunder, and they were bound in £20 each, *omnibus et cuilibet eorum*; and one only brings an action for breach of the covenant. *Held*, that all ought to have joined, as the interest was joint; *Spencer v. Durant*, Comb. 115; S. C., 1 Show. 8.

Action of covenant by the herald painters, *et pro*

quolibet et singulis eorum, that they should bring their work to a certain place, and that the money paid for such work, when it should be received, should be brought to the aforesaid place and divided between them in certain parts and proportions. Action by all the others against one who did not bring his work to the appointed place. *Held*, that, the interest being joint, the action was well brought by all; *Saunders v. Johnson*, Skin. 401.

Covenant with L. and B., their heirs, executors, administrators, and assigns, to pay to L. and B., their executors, &c., one annuity or yearly sum of £80 in the shares and proportions following, viz., the sum of £15, being one moiety of the annuity to L., his executors, &c., and the sum of £15, the remaining moiety, unto B., his executors, &c., to be respectively paid quarterly. The powers for securing the annuity were given to L. and B. jointly. There was a joint power to them to enter up a joint judgment, and a joint power to sell certain stock. The annuity was redeemable on payment of a certain sum to L. and B., their executors or administrators. In an action brought by L. alone for his share of the annuity; *held*, that the covenant was a joint covenant, and that the interest in the annuity was joint, and that L. could not sue alone; *Lane v. Drinkwater*, 1 Cr. M. & R. 599; S. C., 5 Tyr. 40.

F. and W. demised land to the defendant, who covenanted with F. and W., their heirs, executors, &c., to repair, &c. F. died, and his heir brought an action for breaches of covenant committed since F.'s death. *Held*, that W. ought to have joined in the action; *Foley v. Addenbrooke*, 4 Q. B. 197.

Demise by persons who, on the face of the lease appeared to be tenants in common; covenants by the lessees with the lessors "and each and every of them, their and every of their heirs, executors, administrators, and assigns, to repair, &c." *Held*, that the benefit of the covenants was joint and not several; *Bradburne v. Botfield*, 14 M. & W. 559.

Demise by tenants in common, "according to their several estates," the lessees covenanting with them "and their respective heirs and assigns" to repair. *Held*, that the benefit of the covenant was joint and not several; *Thompson v. Hakewell*, 19 C. B., N. S. 718.

Covenant by A. "with B., and also as a distinct covenant with C." to pay interest on money advanced by B. as C.'s trustee. *Held*, that both B. and C. ought to sue for breach of covenant; *Hopkinson v. Lee*, 6 Q. B. 964.

See also *Lery v. Sale*, 37 L. T. 709; *Anderson v. Martindale*, 1 East, 497.

Examples (2) where the covenants enured to the benefit of the covenantees severally. — A. and B. covenant with C. to sell land to him. "*Item*, it is agreed between the parties" that C. shall pay to A. so much money. On non-payment of the purchase-money, an action was brought by A. and B. *Held*, that it ought to have been brought by A. only; *Tippet v. Hawkey*, 3 Mod. 263.

Covenant with A. and B. to receive the rents due to A. and B. and to pay one moiety to each of them. *Held*, that A. could bring an action for his moiety without B.; *Lilly v. Hodges*, 8 Mod. 166.

Agreement under seal by tenants in common to sell land. Covenant by the purchasers "with the vendors and each of them, their and each of their executors, &c.," to pay the purchase-money to the vendors, their executors, &c., in the proportions following, that is to say, &c." *Held*, that interest of the covenantees being several, the covenant was several; *James v. Emery*, 8 Taunt. 245; S. C., 5 Pr. 529.

By deed reciting the grant of one annuity to A. and of another annuity to B., C. covenanted with A. and B., their executors, &c., to pay the annuities or either of them if the grantor should make default. *Held*, that the covenant being for the payment of a distinct annuity to each of the covenantees, one might sue without the

other; *Withers v. Bircham*, 3 B. & C. 254; S. C., 5 Dowl. & Ry. 106. .

Covenant by the master of a vessel with the part owners to pay certain monies 'to them "and to their and every of their several and respective heirs, executors, administrators, and assigns," at a certain banker's, "and in such shares and proportions as were set against their several and respective names." *Held*, that their interests being separate, they must sue separately; *Servante v. James*, 10 B. & C. 410.

By deed, reciting four several contracts for purchase of land from different owners, the defendant covenanted with each of the owners to complete the contract. *Held*, that one of the vendors alone might bring an action on the covenant; *Poole v. Hill*, 6 M. & W. 835.

By deed reciting that the owners of a colliery proposed to divide it into a certain number of shares, and an agreement for sale to the parties of the third part of so many of the shares respectively as were set opposite their respective names, the owners covenanted with each of the purchasers, their executors, &c., to show a good title. *Held*, that the interest of each covenantee was distinct, and therefore that he could bring his action for breach of covenant without the others; *Mills v. Ladbroke*, 7 Sc. N. R. 1005; S. C., 7 M. & Gr. 218.

By deed reciting that A. had agreed to purchase land from the plaintiff, and to sell it to the defendants at a certain price, and containing covenants to that effect, the defendants covenanted with the plaintiff, and as a separate covenant with A., "to pay to the plaintiff, or to A., in case the plaintiff shall then have been paid his purchase-money," the unpaid part of the purchase on a certain day, and to pay interest in the meantime to the plaintiff. *Held*, that the plaintiff might sue without A. in respect of interest; *Keightley v. Watson*, 3 Ex. 716; S. C., 18 L. J., N. S., Ex. 339.

Contract not
under seal.

The rule was applied to the construction of an agreement not under seal in *Pugh v. String-*

field, 3 C. B., N. S., 2; S. C., 4 C. B., N. S., 364.

Rule 164.—A covenant with two or more, or with two or more and each and every of them, where one of them has no beneficial interest in the subject matter of the covenant, will be construed as a covenant with them jointly, and the benefit of it will survive.

Where one
covenantee has
no interest.

Examples.—Indenture of covenants between A. and B., of the one part, and C., of the other part; and (*inter alia*) it is agreed between the parties that C. shall enter into a bond to pay a certain sum to A. On an action brought by the administrator of A. for breach of covenant; *held*, that he could not maintain it, as the benefit of the covenant survived to B.; *Rolls v. Yate*, Yelv. 177; S. C., 2 Brownb. 207; S. C., sub nom. *Yate v. Roules*, 1 Buls. 25.

Covenant with A. and also with B., to pay an annuity to A. *Held*, that on the death of A. the legal interest in the covenant survived to B., and that the executor of A. could not sue; *Anderson v. Martindale*, 1 East, 497; Lord Kenyon, C. J., said (p. 501):—"Though the benefit were only to one of them, yet both had a legal interest in the performance of it; and therefore the legal interest being joint during the lives of both, on the death of one, it survived to the other."

Covenant by lessee with A. and B., and their respective executors, administrators, and assigns, and also with C., his executors, administrators, and assigns, to repair; A. had no legal interest in the land. *Held*, that the benefit of the covenant enured to A., B., and C. jointly, and that after the death of A., B. and C. might join in an action on the covenant; *Wakefield v. Brown*, 9 Q. B. 209. See *Bradburne v. Botfield*, 14 M. & W. 559.

Lease by T., tenant for life, of the first part; R., a receiver appointed by the Court of Chancery, of the second part; and H. of the third part, of certain premises

to H., for a term of years; covenants by H. with R., and other the receiver or receivers for the time being, and to and with such other person or persons as for the time being should be entitled to the freehold or inheritance, or to the rents and profits of the said premises, and to and with every of them." *Held*, that an action for breaches of covenant by H. during T.'s lifetime could not be brought by T.'s executor, but that it must be brought by the receiver and freeholder for the time being jointly; *Southcote v. Hoare*, 8 Taunt. 87.

CHAPTER XXIX.

MUTUAL COVENANTS.

Covenants dependent and independent distinguished: Condition precedent: Whether covenants are precedent is a question of construction: Causes of dependency: Dependency owing to time fixed for performance of covenants: Covenant by defendant to be performed (1) before, (2) after, (3) simultaneously with the covenant by plaintiff: Dependency arising from nature of covenants: Covenant by plaintiff the whole or part only of the consideration for the covenants by the defendant: Clauses introduced by participles or the words "To be."

WHERE a deed contains mutual covenants a question of great nicety arises—viz., Are the covenants dependent or independent? In other words, can one of the parties bring an action against the other for breach of covenant, without having performed his own covenant? The question generally arises as a point of pleading, but the answer to it depends entirely on the construction of the deed.

The relation between covenants, one of which is dependent on the other, is sometimes expressed by saying that the performance of the one is a condition precedent to liability under the other.

"In contracts containing executory considerations, or mutual promises, that is to say, in which a promise on the one side is given in consideration of a promise on the other, the mere promise, and not the performance of it, constitutes the consideration, strictly so called; and the obligation of the one promise may be quite independent

Covenants
dependent and
independent
distinguished.

Condition
precedent.

Whether covenants are independent is a question of construction.

of the performance of the other. But it may appear upon the correct construction of the terms of such mutual promises, or from the connection of their matter, that the obligation of the one promise is, expressly or impliedly, conditional upon the due performance of the other; and then the performance of the promise, constituting the executory consideration, is a condition precedent to the liability to perform the other promise; in the latter case, the promises are not only mutual but also dependent; in the former case, they are independent in regard to performance." Leake on Contracts, Part 3, ch. 2, pp. 647 *et seq.* See 2 Sm. L. C. (8th ed.) 14.

"The rule has been established by a long series of decisions in modern times, that the question, whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way. . . . The parties to a contract may undoubtedly, if they think proper, agree that the right of one party to maintain an action against the other shall be conditional, and shall depend on the plaintiff's strict performance of the covenants entered into by himself; and if words are used in the contract so precise, express, and strong, that such intention, and such intention only, is compatible with the terms employed, however inconsistent it may be with general principles of reasoning, a Court can only give effect to such declared intention of the parties. The only question in every particular case is, whether such intention is so declared;" per Tindal, C. J., *Stavers v. Curling*, 3 Bing. N. C. 368; and see per Blackburn, J., *Bettini v. Gye*, 1 Q. B. D., at p. 187; and in *Graves v. Legg*, 9 Ex. 709, Parke, B. (at p. 716), speaks of "the numerous cases in which it has been laid down that the general rule is to construe covenants and agreements to be dependent or independent according to the intent and meaning of the

parties to be collected from the instrument, and, of course, to the circumstances legally admissible in evidence with reference to which it is to be construed."

"The clearest words of condition must yield to the prominent intention of the parties as gathered from the whole instrument;" *per* Byles, J., *London Gas Light Co. v. Chelsea Vestry*, 8 C. B. (N. S.) at p. 239.

"There are no precise technical words required in a deed to make a stipulation a condition precedent or subsequent, neither doth it depend upon the circumstance whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant. For the same words have been construed to operate as either the one or the other, according to the nature of the transaction;" *per* Ashhurst, J., *Hotham v. East India Co.*, 1 T. R. 645.

"The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties; and, however transposed they may be in the deed, their precedency must depend on the order of time (a) in which the intent of the transaction requires their performance;" *per* Lord Mansfield, C. J., *Kingston v. Preston*, cited 2 Doug. 689. And see *per* Lord Kenyon, C. J., *Porter v. Shepherd*, 6 T. R. at p. 668, cited by Lord Chelmsford in *Roberts v. Brett*, 11 H. L. C. at p. 354.

"I do not think that the rules which are laid down as to the construction of agreements in which there are cross contracts, in order to see whether these cross contracts are dependent or independent, are of much assistance where, as here, the question is whether a matter is expressly made a condition precedent. . . . All agree that the question is, What is the intention to be collected from the words?" *per* Lord Blackburn, *London Guarantie Co. v. Fearnley*, 5 App. Cas. at p. 917. In that case the plaintiff brought an action to recover the amount of a guarantie policy against embezzlement by a servant of the

(a) But see Rules 168 and 169, *post*, p. 460.

plaintiff. The policy expressly stated that it was "subject to the conditions herein contained, which shall be conditions precedent to the right to recover under this policy." Among the conditions was one that the employer should, if required, prosecute the servant for any wrongful act covered by the policy. The defendants pleaded that they had required plaintiff to prosecute, but he had not done so. Lords Blackburn and Watson held that the effect was that all the conditions were expressly made conditions precedent. Lord Selborne, C., dissented on the ground that the condition in question was not in its nature precedent.

Causes of
dependency.

Covenants may be dependent, either owing to the time when they have to be performed, or owing to their nature, or subject matter. Dependency as caused by time is treated of in Rules 165, 166, and 167; and as caused by the nature of the covenants, in Rules 168 and 169.

Dependency owing to the Time fixed for Performance.

Dependency
owing to time.

If *A.* be the thing covenanted to be done by *A.*, and *B.* the thing covenanted to be done by *B.*, three cases may occur: *first*, the time for doing *A.* may be before the time for doing *B.*; *second*, the time for doing *A.* may be after the time for doing *B.*; *third*, *A.* and *B.* may have to be done simultaneously.

Where time
for thing to
be done by
defendant
may happen
before thing
to be done by
plaintiff (*b*).

Rule 165.—If a time be fixed for doing *A.*, which must, or may, happen before *B.* ought to be done, *B.* can bring an action against *A.* for not doing *A.* without previously doing *B.*; Platt on Cov. 95 *et seq.*

This rule is stated in the notes to *Pordage v. Cole*, 1 Wms. Saund. 320, note 4 (p. 551, ed. 1871), as follows: "If a day be appointed for payment of money, or

Deed poll.

(*b*) As to the distinction where the defendant's covenants are contained in a deed poll, see *Lock v. Wright*, 1 Str. 569; S. C. 8 Mod. 40.

part of it, or for doing any other act, and the day is to happen, or *may* happen, *before* the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent: and so it is where *no time* is fixed for the performance of that which is the consideration for the money or other act."

In *Roberts v. Brett*, 18 C. B. 561, at p. 573, Jervis, C. J., after citing this rule (as stated in the notes to *Pordage v. Cole*), says: "But, after all, that rule only professes to give the result of the intention of the parties: and where, on the whole (*a*), it is apparent that the intention is that that which is to be done first is not to depend upon the performance of the thing that is to be done afterwards, the parties are relying on their remedy, and not on the performance of the condition; but where you plainly see that it is their intention to rely on the condition and not on the remedy, the performance of the thing is a condition precedent;" S. C. 25 L. J. C. P. 280; 11 H. L. C. 337.

"When one promises, agrees, or covenants to do one thing *for* another, there is no reason he should be obliged to do it till that thing, *for* which he promised to do it, be done; and the word '*for*' is a condition precedent in such cases. But upon this head some diversities are to be observed. *First*, if there be a day set for the payment of money, or doing the thing which one promises, agrees, or covenants to do, *for* another thing, and that day happens to incur before the time the thing, *for* which the promise, agreement, or covenant is made, is to be performed by the tenor of the agreement; there, though the words be '*that the party shall pay the money,*' or, '*do the thing for such a thing,*' or, '*in consideration of such a thing,*' after the day is past the other shall have an action for the money or

(*a*) *Sic.*, in L. J. "whole instrument."

other thing, although the thing, for which the promise, agreement, or covenant was made, be not performed; for it would be repugnant there to make it a consideration precedent; and, therefore, they are in that case left to mutual remedies, on which, by the express words of the agreement, they have depended. *Vide* 48th Ed. 3, 2, 3, cited in *Ughtred's Case*, 7 Rep. 10 b. (a), where the diversity is taken when there are mutual remedies and not: it is thus put in that book: *Sir R. Pool* covenants with *Sir R. Tolcelser* to serve him with three esquires in the wars of France. *Sir R. Tolcelser* covenants, in consideration of those services, to pay him so much money; and there it is said, action will lie for the money without any services performed. But if you look into the book at large, you will find it was upon the diversity which I have taken; for the Case in 48th Ed. 3, 2, 3 is, *R. Pool* covenants with *R. Tolcelser* to serve him with three esquires in the wars of France, and *R. Tolcelser* covenanted with him to pay him so much for the service; and it was further agreed, that twenty marks of the money should be paid in England, at a day certain, before they went for France, and the rest by quarterly payments, which might likewise incur before the service; and upon action brought by *Sir R. Pool*, it was objected that the service was not performed; but there was no room for that objection upon the diversity which I have taken, the money, by the agreement, being made payable at a day certain, before the service was to have been performed;” *per* Holt, C.J., *Thorp v. Thorp*, 12 Mod. 460; S. C., 1 Ld. Ray. 662.

“ It has long been the practice of companies insuring against fire to incorporate in their policies various stipulations for matters to be done by the assured making a claim before the company is to pay them, and (as the remedy by action for not complying with these stipulations

(a) See Platt on Covenants, 96: who says, “The case in the Y. B. is inaccurately stated by Lord Coke . . . It appears in the Y. B. that the covenant was that half the money was to be paid in England before they went to France: the principle therefore of that case agrees with the doctrine of Holt in *Thorp v. Thorpe*, as is observed by him in 12 Mod. 461.”

would not afford them any protection), to make the fulfilment of those conditions a condition precedent to their obligation to pay. . . . In the present case . . . so far as any of their stipulations*are for something to be done preliminary to the completion of the proof satisfactory to the directors, from which completion of proof the time of the payment is to run, I think it is not disputed that they have effected their object. But such stipulations as relate to things to be done after payment is due are not, and cannot be, conditions precedent;" *per* Lord Blackburn, *London Guarantie Co. v. Fearnley*, 5 App. Cas. 915-16.

"When the parties to a contract make a stipulation in which nothing is expressed as to time, and which might, according to its own terms, be fulfilled either within or after the period during which it could operate as a condition precedent, and the parties then go on to declare that it shall be a condition precedent, I think the declaration must, *prima facie*, be held to be a sufficient expression of their intention to limit the time of performance to the antecedent period;" *per* Lord Watson, *ib.* at p. 920.

Examples.—Agreement under seal that B. shall pay A. a sum of money for his lands on a certain day, but no day was fixed for the conveyance. *Held*, that A. might bring his action for the money before conveyance: *Pordage v. Cole*, 1 Wms. Saund. 319 (p. 548, ed. 1871).

Agreement under seal by A. to purchase, and by B. to sell certain premises, and A. thereby covenanted to pay on or before a fixed day, as the consideration of the sale, a certain sum with interest till completion. *Held*, that B. might sue for the purchase-money without previously tendering a conveyance; *Mattock v. Kinglake*, 10 Ad. & El. 50; S. C. 2 Per. & D. 343.

Covenant by defendant that within six months from the passing of a proposed railway bill, and before the company should enter upon the plaintiff's land, except for certain specified purposes, he would pay to plaintiff £4,000 for the purchase of certain land; and covenant by plaintiff, that,

on payment of the said sum of £4,000 with interest, after the expiration of six months from the passing of the bill he would convey the land. *Held*, that plaintiff could sue for the money before conveying the land; *Sibthorp v. Brunel*, 3 Ex. 826. See also *The Thames Haven Dock and Railway Company v. Brymer*, 5 Ex. 696.

B. covenanted to pay seamen's wages yearly, and "in consideration thereof, A. covenanted to pay B. £42 every month." *Held*, that B. might bring an action for the £42 without showing that he had paid the wages; *Russen v. Coleby*, 7 Mod. 286.

B. covenants to build a house for A., and to finish it before a certain day, in consideration of a sum of money, which A. covenants to pay him by instalments as the building proceeds. *Held*, that B. can bring his action for the money, though the building be not complete at the time appointed; *Terry v. Duntze*, 2 H. Bl. 389.

Agreement under seal that plaintiff should take defendant as partner, to commence *from* and *after* the 29th September: covenant by the defendant to pay £300 *on* or *before* that day as a premium. The plaintiff can bring an action for non-payment without tendering articles of partnership; *Walker v. Harris*, 1 Ans. 245.

B., in consideration of the sum of £250 paid by A., and of the further sum of £250 to be paid by him, covenanted with A. to teach him the art of bleaching linen with all possible despatch; and A. covenanted that he would on a certain day, or sooner if B. should before that time have instructed him, pay the further sum of £250. *Held*, that B. might sue A. for the £250 without averring that he had taught him the art of bleaching linen; *Campbell v. Jones*, 6 T. R. 570.

Plaintiff and defendant agreed under seal to enter into partnership as apothecaries till Jan. 1, 1846, that defendant should pay plaintiff £800, and should be entitled to all the profits of the business, and that plaintiff should, after the 1st January, 1846, introduce the defendant as his successor, and use his best endeavours to establish him in the business; and in consideration thereof, the

defendant covenanted to pay a further sum of £50 to plaintiff on the 25th March, 1846. *Held*, that the introduction of the defendant by the plaintiff was not a condition precedent to the payment of the £50, as the plaintiff would still be under an obligation to introduce him after the 25th March, 1846; *Judson v. Bowden*, 1 Ex. 162.

Plaintiff covenanted with defendant to deliver up a farm on a certain day, and in the meantime to cultivate it on the four-course system, and that on the surrender he would deliver up an agreement to be cancelled, and would surrender all his unexpired term and interest, and, if defendant required, would at any time afterwards execute any deed for further assurance; and defendant covenanted with plaintiff that if plaintiff delivered up the farm, and in the meantime cultivated it on the four-course system and performed all and singular other the covenants, &c., then the defendant would pay for the manure on the delivery up of the farm. *Held*, that plaintiff could sue on the covenant to pay for the manure though he had not delivered up the agreement. Baron Bramwell said:—"The defendant's covenant appears to be made conditional upon the performance of *all* the covenants on the part of the plaintiff. But some of them, such as that for further assurance, are not to be performed till after the time for payment. Therefore it is impossible to construe the covenant literally. The reasonable construction is that the plaintiff is entitled to recover for the manure, and that the breach of his covenant is the subject of a cross action." Bramwell, Watson, and Channell, BB., all point out that delivery up of the agreement was not of the essence of the contract; *Newson v. Smithies*, 3 H. & N. 840.

The plaintiff guaranteed the payment at maturity to the defendant of certain bills held by him, and the defendant guaranteed the payment to the plaintiff of certain goods sold by him to a third person. *Held*, that the guarantees were independent; *Christie v. Borelly*, 7 C. B. N. S. 561.

By marriage articles the wife's father covenanted to

make certain payments during his life, and to settle a certain portion of his estate at his death on the husband and wife during their respective lives, and after their deaths on their issue; and the husband covenanted to insure his life and to settle the policy and other property in like manner: in default of issue, the property settled by the husband was to revert to him. The marriage took place, and the wife died without issue: the husband did not insure his life or make any settlement according to his covenant, and refused to execute the settlement drawn according to the articles. *Held*, that the performance by the husband of his covenant was not a condition precedent to the performance by the father; *Jeston v. Key*, L. R. 6 Ch. 610 (a).

If *A.* be the thing covenanted to be done by *A.*, and *B.* the thing covenanted to be done by *B.* :

When the thing to be done by plaintiff must precede the thing to be done by defendant.

Rule 166.—If the time fixed for doing *A.* must happen after the time for doing *B.*, *B.* cannot bring an action against *A.* for not doing *A.* without previously doing *B.*; in other words, *B.* is a condition precedent. *Platt on Covenants*, 83, *et seq.*; *Leake on Contracts*, 649.

This rule is stated in the notes to *Pordage v. Cole*, 1 Wms. Saund. 320, note (4), (p. 552, ed. 1871), as follows:—"When a day is appointed for the payment of money, &c., and the day is to happen *after* the thing, which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., before performance."

"If there be a day for the payment of the money, or

Specific performance of marriage articles.

(a) Specific performance of marriage articles can be obtained by the wife or the children of a marriage; *Perkins v. Thornton*, Amb. 502; *Harvey v. Ashley*, 3 Atk. at p. 611; *Crofton v. Ormsby*, 2 Sch. & Lef. at p. 602; *Lloyd v. Lloyd*, 2 My. & Cr. 192, against any person who has contracted to make provisions for them, though some other person who has contracted to make provisions for them has made default in doing so.

doing of other act, *for* another, and that day is to be after the performance of the thing *for* which the promise, &c., was made, there, if the agreement be to pay the money, or do other thing, '*for*' or '*in consideration*,' or such other words that would make a condition precedent, there such things, for the doing or performing of which the other agrees to pay the money, or do other thing, must be averred to maintain an action;" *per* Holt, C. J., *Thorp v. Thorp*, 12 Mod. 462; S. C., 1 Ld. Ray. 662.

Examples.—In many instances this rule has been applied to the construction of charterparties (*a*), where, the covenant being that the merchant should pay the freight on the delivery of the goods at a certain place, the goods were not delivered because, part of them had been taken by pirates; *Bright v. Cowper*, 1 Brownl. 21 (*b*); or the ship did not arrive; *Clarke v. Gurnell*, 1 Bulst. 167; or the ship was wrecked before arrival; *Cook v. Jennings*, 7 T. R. 381; *Gibbon v. Mendez*, 2 B. & Al. 17; *Mitchell v. Darthez*, 2 Bing. N. C. 555; or the ship was wrongfully seized and prevented from going on her voyage; *Smith v. Wilson*, 8 East, 437; or the goods were seized by a foreign government; *Storer v. Gordon*, 8 M. & S. 308; or the ship, in pursuance to directions from the freighter's agent, proceeded to a port different from that named in the charterparty; *Thompson v. Brown*, 7 Taunt. 656; or where the merchant was held justified in declining to perform his part of the contract on the ground that the ship was to sail on a certain day and failed to do so; *Gladholm v. Hays*, 2 Man. & Gr. 257 (see *Croockewit v. Fletcher*, 1 H. & N. 893); or that she was not ready to receive cargo at the time agreed upon; *Oliver v. Fielden*, 4 Ex. 135.

By marriage articles, the intended husband covenanted to settle £2,000 in a particular manner, and the intended

(*a*)*See Benjamin on Sales, Bk. IV. Pt. I., p. 546, 3rd ed.; Abbott on Shipping, Pt. IV. Ch. IX. s. 8, 12th ed. p. 368 *et seq.*

(*b*) See remarks on *Bright v. Cowper* in Abbott on Shipping, 12th ed. p. 379, where it is observed that it is not clear whether the merchant claimed the whole or only part of the freight.

wife's father covenanted to make a settlement; but it was expressly agreed that, before the father should make the settlement which he had agreed to make, the husband should purchase and settle £840 per annum, part of the £2,000 per annum. The marriage took effect, and the father died before anything was done; then the wife died without issue. *Held*, on a suit by the husband against the infant heir of the father, that the settlement of the £840 by the plaintiff was a condition precedent to the performance of the covenant by the father; *Ferchersham v. Watson*, Finch, Ca. Ch. 445; S. C., Freem. Ch. 35 (a).

Agreement under seal that the plaintiffs should supply, and that the defendants should accept, coke, "to be to the satisfaction of the defendants' inspecting officer for the time being." *Held*, that it was a condition precedent to the right of the plaintiffs to insist upon the defendants' acceptance of the coke that it should be to the satisfaction of their inspecting officer; *Grafton v. Eastern Counties Ry. Co.*, 8 Ex. 699; but see *Jones v. Cannock*, 5 Ex. 713.

An agreement under seal between A. and B. contained several stipulations, and it was agreed and declared that for the true performance of the covenants by A. hereinbefore contained, and for securing any penalties which he might incur under these presents, A. and two responsible sureties "shall within ten days after the execution of these presents, execute a bond to B. in a penalty of £5,000," and that B. shall execute a similar bond to A. *Held*, first, that A.'s covenant to give a bond, and B.'s like covenant were independent; second, that A.'s covenant to give a bond, and B.'s liability under his other stipulations were dependent, so that it was a condition precedent to A.'s right to recover damages against B. in respect of a breach of such stipulations, that A. should have given the bond, and that the fact of B. not having given his bond did not better A.'s position; *Roberts v. Brett*, 11 H. L. C. 337.

(a) But see *ante*, p. 454, note.

Arbitration Clauses.

Dependency in respect of time may be illustrated by Arbitration. the cases in which an instrument contains an agreement to refer to arbitration any matter of dispute arising under the instrument.

In *Dawson v. Fitzgerald*, L. R. 9 Ex. 7 ; 1 Ex. D. 257, the defendant, a lessee, covenanted with the plaintiffs, his lessors, that he would not keep up an injurious quantity of ground game, and that in case he should do so, he would pay to the plaintiffs a fair and reasonable compensation, "the amount of such compensation, in case of difference, to be referred to the arbitration of two arbitrators," &c. The plaintiffs sued for breach of the covenant to pay compensation: the defendant pleaded that there had been no reference to arbitration. A majority (Kelly, C.B., and Pigott, B.) of the Court below held that the plea was good, on the ground that the covenant to pay compensation and the covenant to refer were dependent covenants, and that arbitration and award were a condition precedent to liability. Bramwell, B., who dissented, stated his view of the law (L. R. 9 Ex. at p. 10), as follows: "If there be a covenant to pay in a certain event, and a separate and collateral covenant that, in case of difference, that difference shall be referred to arbitration, the two are distinct from each other, and one may be broken whether the other be broken or not; and it is no matter whether the two covenants are in different deeds, or in the same deed at different parts of it, or following each other consecutively. If, on the other hand, there is only a covenant to pay whatever upon arbitration shall be found to be due, then no action can be maintained until the arbitration has taken place." On appeal, the judgment of the majority of the court below was reversed. Jessel, M.R., said (1 Ex. D. p. 260): "I take the law, as stated by the highest authority—the House of Lords—to be this. There are two cases where such a plea as the present is successful; first, where the action can only be brought for the sum named by the arbitrator; secondly,

where it is agreed that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant to pursue one of two courses, either to bring an action for not referring, or to apply under s. 11 of the Common Law Procedure Act, 1854, to stay the action till there has been an arbitration." *Scott v. Avery*, 5 H. L. C. 811; *Elliott v. Royal Exchange Assurance Co.*, L. R. 2 Ex. 237; and *Tredwen v. Holman*, 1 H. & C. 72, were cited with approval.

In *Babbage v. Coulburn*, 9 Q. B. D. 235, it was held that under an agreement by a lessee to pay for dilapidations, the amount, if disputed, to be settled by valuers, the valuation was a condition precedent to the lessor's right to sue in respect of the dilapidations. Field, J., distinguished *Dawson v. Fitzgerald*, saying: "In that case the result was different, because there was an independent covenant to pay a fair and reasonable compensation, while here there is only a covenant to pay a sum ascertained by valuers;" S. C., affirmed by C. A. (diss., Cotton, L.J.) 46 L. T. 794. See also *Collins v. Locke*, 4 App. Cas. 674, 689; *Edwards v. Aberayron, &c. Society*, 1 Q. B. D. 563, especially the judgment of Brett, J., at pp. 592 *et seq.*

If *A.* be the thing covenanted to be done by *A.*, and *B.* the thing covenanted to be done by *B.*:

Where covenants are to be performed simultaneously.

Rule 167.—Where *A.* and *B.* are to be done simultaneously, neither *A.* nor *B.* can maintain an action without shewing that he has done, or offered to do, *A.* or *B.* respectively; Platt on Covenants, 86 *et seq.*; Leake on Contracts, 652 *et seq.*

This rule is stated in the notes to *Pordage v. Cole*, 1 Wms. Saund. 320, note (4), s. 5 (ed. 1871, p. 556), as follows: "Where two acts are to be done *at the same time*,

as where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay A. a sum of money on the same day, neither can maintain an action without shewing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale."

Examples.—Action for debt on a bond conditioned for the payment of so much money "on request, the plaintiff assigning over to the defendant such a judgment against C." Judgment for the plaintiff, it appearing that he had offered to assign the judgment; *Turner v. Goodwin*, 10 Mod. 154; S. C., *Ibid.* 189, 222.

A. covenanted with B. that, upon the tender and payment by B. of a certain sum on or before a certain day, A. would transfer certain stock to him. The money not being paid, A. brought his action; but as he did not sufficiently allege a tender or transfer of the stock, judgment for B.; *Stapleton v. Shelburne*, 1 Bro. P. C. 215.

Plaintiff covenanted to sell to the defendant a school-house, and to convey the same on or before the 1st of August; and in consideration thereof the defendant covenanted to pay the plaintiff £120 on or before the 1st August. *Held*, that the plaintiff could not maintain his action for the £120 without averring that he had conveyed or tendered a conveyance; *Glazebrook v. Woodrow*, 8 T. R. 366. See also *Thorp v. Thorp*, 12 Mod. 455; *Goodisson v. Nunn*, 4 T. R. 761; *Heard v. Wadham*, 1 East, 619.

Covenant by defendant to give up his business on a certain day to the plaintiff, and covenant by plaintiff to accept the business, and "at and before the delivery of the deeds procure good security to be given to the defendant, to be approved of by the defendant, for the payment of £250 monthly to the defendant." The plaintiff sued the defendant for not giving up his business and the defendant pleaded that the plaintiff had not offered or given sufficient security; judgment for the defendant, "because the part to be performed by the

plaintiff was clearly a condition precedent ;" *Kingston v. Preston*, cited 2 Doug. 689.

Dependency arising from the Nature of the Covenants.

If *A.* be the thing covenanted to be done by *A.*, and *B.* the thing covenanted to be done by *B.* :

Where covenant is sole consideration.

Rule 168.—If *A.* be the sole consideration for *B.* (or, as it is sometimes expressed, goes to the root of the contract), *A.* cannot bring his action without doing, or offering to do, *A.* ; in other words, the covenants are dependent.

Where covenant is part of consideration and non-performance can be compensated.

Rule 169.—If *A.* be part only of the consideration for *B.*, and the non-performance of *A.* can be compensated by damages, *A.* can bring his action without doing, or offering to do, *A.* ; in other words, the covenants are independent.

See, as to both these rules, Leake on Contracts, 650 *et seq.* ; Platt on Covenants, 90 *et seq.*

These rules are laid down in the notes to *Pordage v. Cole*, 1 Wms. Saund. 320 (pp. 556 and 552, ed. 1871), as follows : " Where the mutual covenants go to the whole consideration on both sides, they are mutual considerations, and performance must be averred."

" Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration."

The leading case on both these rules is *Boone v. Eyre*, 1 H. Bl. 273, note ; S. C., 2 W. Bl. 1812, another action between same parties. There the plaintiff conveyed a plantation in the West Indies, with the negroes on it, in consideration of a sum down and an annuity, and cove-

nanted that he was lawfully possessed of the negroes. The defendant covenanted that, the plaintiff well and truly performing all and everything therein contained on his part to be performed, he, the defendant, would pay the annuity. To an action for non-payment of the annuity, the defendant pleaded that the plaintiff was not at the time of making the deed lawfully possessed of the negroes. On demurrer, Lord Mansfield, C.J., said (1 H. Bl. 278 n.): "The distinction is very clear: where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action."

Observation on Rule 168.—A defendant who has had a substantial part of the consideration cannot set up the non-performance by the plaintiff of a consideration precedent; *Curter v. Scargill*, L. R. 10 Q. B. 564, citing *per Parke, B.*, in *Graves v. Legg*, 9 Ex. at p. 716; *White v. Bealon*, 7 H. & N. 42; and *Ellen v. Topp*, 6 Ex. at p. 441 (*post*, p. 462). Accordingly, it is impossible after a marriage to set aside the marriage contract on the ground of the failure of a pecuniary consideration; *Campbell v. Ingilby*, 21 Beav. 567; on app. 1 De G. & Jo. 393.

Examples of Rule 168.—Where the defendant covenanted to pay the plaintiff a certain sum, the plaintiff making to him a sufficient estate in certain lands before St. Thomas's Day: *Held*, that the words "the plaintiff making," &c., were a condition precedent, *i.e.*, that the covenants were dependent; *Large v. Cheshire*, 1 Vent. 147; S. C., 2 Keb. 801. (See likewise *Atkinson v. Smith*, 14 M. & W. 695, and *Duke of St. Albans v. Shore*, 1 H. Bl. 271; *Graves v. Long*, 9 Ex. 709; cases of *assumpsit*; and *Bradford v. Williams*, L. R. 7 Ex. 259; *Heard v. Wadham*, 1 East, 619). In *Bradford v. Williams* (*sup.*), Martin, B.,

Examples of
dependent
covenants.

said: "I think the words 'condition precedent' are unfortunate. The real question, apart from all technical expressions, is, what in each instance is the substance of the contract."

Apprentice.

Where a master leaves off his business he cannot bring an action on the covenant by the apprentice to serve him; *Ellen v. Topp*, 6 Ex. 424.

Where an apprentice ran away and enlisted as a soldier, it was a sufficient excuse for his master not performing his covenant to teach him; *Hughes v. Humphreys*, 6 B. & C. 680; *Cuff v. Brown*, 5 Price, 297.

See also *Newson v. Smithies*, 3 H. & N. 840, *ante*, p. 453; *Poussard v. Spiers*, 1 Q. B. D. 410.

Examples of independent covenants.

Examples of Rule 169.—A. covenanted with B. not to interfere in a certain branch of the Scotch fish business, and to assign to B. a certain Scotch fishery. B., in consideration of the assignment and of A.'s covenant, covenanted to pay A. an annuity. *Held*, that the covenant not to interfere in the business was only a part of the consideration for the annuity, and was therefore not a condition precedent, but an independent covenant; *Carpenter v. Cresswell*, 4 Bing. 409; 1 M. & P. 66.

A breach of the covenant by an apprentice to serve his master faithfully is no defence to an action against the master for not teaching him according to his covenant; *Winston v. Linn*, 1 B. & C. 460; *Phillips v. Clift*, 4 H. & N. 168.

Covenant to supply goods (a).

Agreement under seal that defendants should supply and plaintiffs purchase all the coke required by plaintiffs for working their railway; covenant by plaintiffs that so long as the defendants should punctually supply the said

Contract to supply goods.

(a) It will be observed that where A. covenants to supply goods to B., and B. covenants to pay for them, the effect of holding the performance by A. of his covenant to be a condition precedent to his right of action for the purchase money, would be to prevent him from recovering the purchase-money if he failed in delivering any one article; while, if the covenants are held to be independent, B. can, if he is really injured by A.'s default, bring a cross action on A.'s covenant.

coal they would abstain from purchasing coke from other persons. *Held*, that the fact of the plaintiff having purchased coke from other persons was no answer to an action brought by them against the defendants for not delivering coke; *Eastern Counties Railway Co. v. Philipson*, 16 C. B. 2.

Covenant by plaintiff with defendants, that he being provided by defendants with rails and chairs, would complete part of the railway and the permanent way before the 1st of June; covenant by defendants with plaintiff to pay him £15,000 by instalments; provision that if the plaintiff should not complete the railway by 1st of June, the defendants might retain part of the £15,000 for every day of delay; defendants did not furnish the rails till after the 1st of June. *Held*, on an action for the £15,000, that the covenants were independent; and the furnishing of the rails was not a condition precedent; *Mackintosh v. Midland Counties Railway Co.*, 14 M. & W. 548.

Plaintiffs contracted by deed with the Vestry of C. to supply gas to the public lanterns of the parish of C.; covenanting (*inter alia*) that they would to the satisfaction of the Vestry light each lamp at sunset and continue it lighted till sunrise, and also as to the purity and illuminating power of the gas. The Vestry covenanted, the plaintiffs performing their covenants, to pay a certain sum per annum for each gas lamp. On an action brought to recover the money, the Vestry pleaded non-performance by the plaintiffs of their covenants. *Held*, that the covenants by the plaintiffs and defendants were independent; *London Gaslight Co. v. Chelsea*, 8 C. B. N. S. 215.

In a dissolution deed between two partners, A. and B., A. assigned to B. certain shares, and covenanted for further assurance; and B. covenanted with A. to indemnify him against certain liabilities: on a suit by B. to enforce A.'s covenant for further assurance, it was held that a breach by B. of his covenant to indemnify A. was no defence, for that the covenants were independent; *Gibson v. Goldsmid*, 5 De G. M. & G. 757; reversing S. C., 18 Beav. 584.

The conveyances of plots forming part of a building estate contained covenants by the respective purchasers against building beyond either the front or rear building lines. In an action by a purchaser of one plot against the purchaser of the adjoining plot to restrain a breach of the covenant as to the front building line: *Held*, that the covenants were independent, and therefore the plaintiffs' right to relief was not barred by a breach on his own part of the covenant as to the rear building line; *Chitty v. Bray*, 48 L. T. 860.

See also *Storer v. Gordon*, 3 M. & S. 308; *Davidson v. Gwynne*, 12 East, 380; *Ritchie v. Atkinson*, 10 East, 294; *Havelock v. Geddes*, 10 East, 555; *Fothergill v. Walton*, 8 Taunt. 576; S. C., 2 J. B. Moore, 630; *Stavers v. Curling*, 3 Bing. N. C. 355; S. C., 3 Scott, 740; 2 Hodges, 237 (all cases on the construction of charterparties):—*Bettini v. Gye*, 1 Q. B. D. 183.

See also *Fearon v. Earl of Aylesford*, 12 Q. B. D. 539, affirmed on appeal, W. N. 1884, p. 208, which decides that covenants in a separation deed by which the husband covenants to pay an annuity to a trustee for the wife, and the trustee covenants with the husband that the wife should not molest him, are independent covenants.

Clauses introduced by Participles, or by the Words
"To be."

A clause introduced by a participle, or by the words "to be," may itself amount to a covenant, or it may be a mere qualification of the covenant with which it is connected (see the remarks *ante*, p. 419 *et seq.*, and the cases falling under these heads respectively there cited, and Platt on Covenants, 99 *et seq.*). In the latter case it forms a condition precedent to liability under the qualified covenant; but if it amount itself to a covenant, it may or may not form a condition precedent according as it is or is not a dependent covenant.

In cases of this class we must first determine whether

the clause in question amounts to a covenant, and if it does, then whether it is or is not dependent.

We here give examples of clauses amounting to covenants, dividing them into cases of (1) Independent, and (2) Dependent Covenants.

Examples (1). Clauses held to create independent covenants, i.e., not to be conditions precedent.—Clause introduced by participle or "to be" creating independent covenants. Covenant by lessor with lessee, "that he paying the rent and performing the covenants on his part to be performed," shall quietly enjoy. On an action by the lessee for breach of covenant, the lessor pleaded that the lessee broke his covenants, and that therefore the lessor's covenant ceased to oblige him. *Held*, on demurrer, that the words "paying and performing" did not amount to a condition precedent; *Hayes* or *Hays* v. *Bickerstaffe*, 2 Mod. 34; S. C., Freem. K. B. 194; S. C., Vau. 118 (where the report is on the meaning of the covenant for quiet enjoyment). See also *Allen* v. *Babington*, 1 Sid. 280; S. C., 2 Keb. 923; *Dawson* v. *Dyer*, 5 B. & Ad. 584; *contra*, *Anon.*, 4 Leon. 50.

Lease reserving the trees, covenant by lessee with the lessor that he should have liberty to fell the trees and root them up, "repairing the hedges where they grow." *Held*, that the words "repairing," &c., amounted to an independent covenant by the lessor; *Warren* v. *Arthur*, 2 Mod. 317.

The defendant covenanted with the plaintiff that he, the plaintiff, "doing, fulfilling, and performing all the covenants in the indenture contained," he, the defendant, would pay an annuity. *Held*, that the words "doing," &c., amounted to an independent covenant; *Boone* v. *Eyre*, 2 W. Bl. 1312.

Examples (2). Clause held to create a dependent covenant, i.e., a condition precedent.—The defendant covenanted to pay a certain sum to the plaintiff, the plaintiff making him an estate in certain lands; *Large* v. *Cheshire*, 1 Vent. 147. Clause introduced by participle or the words "to be" creating a condition precedent.

Agreement for a yearly tenancy, the lessee agreed to

keep the premises in repair, "*the same being first put into good order and condition by the lessor;*" *Neale v. Ratcliff*, 15 Q. B. 916. See also *Coward v. Gregory*, L. R. 2 C. P. 153.

Covenant by lessee to repair, "the lessor allowing and assigning timber for repairs;" *Thomas v. Cadwallader*, Willes, 496.

Covenant by lessee of house to pay rent and keep premises in repair; covenant by lessor that the lessee, on giving six months' notice before the end of the term, should have a renewed lease, "*upon paying the rent, and performing and observing the covenants of the lease.*" *Held*, that the performance of the covenants by the lessee was a condition precedent to his privilege of having a renewed lease; *Bastin v. Bidwell*, 18 Ch. D. 238.

Plaintiff agreed to sell wool to the defendant, "*the names of the vessels to be declared as soon as the wool was shipped.*" *Held*, on an action by the plaintiff for the price of the wool on the defendant refusing to accept it, that the declaring of the names of the vessels within a reasonable time after shipping the wool was a condition precedent to the plaintiff's right to recover; *Graves v. Legg*, 9 Ex. 709.

"All arrears being paid;" *Grey v. Friar*, 4 H. L. C. 565. The difficulty in this case arose on the context: there was a power to the lessee to determine the lease, "all arrears being paid . . . without prejudice to any claim . . . which any of the parties hereto may then be entitled to for breach of any of the covenants hereinbefore contained."

CHAPTER XXX.

QUALIFIED COVENANTS AND COVENANTS FOR TITLE (a).

Covenant general or absolute qualified by context: Covenant followed by words "but that," &c.: Whether qualifying words in one covenant affect other covenants: Covenants for title: Covenant for quiet enjoyment "without interruption, disturbance," &c., means lawful interruption, disturbance, &c.: Except where interruption, &c.: or by covenantor "and his heirs," or, "and his executors," or by specified person: Disturbance by suit in Equity: Disturbance caused by covenantee's own acts: Covenant against incumbrances: Construction of special words: "Acts," "means," "procurement," "neglect," "default": "Permit and suffer": Who are persons "claiming under" the covenantor: Things appurtenant, &c.: Covenants for further assurance.

Rule 170.—A covenant general or absolute in terms may be restricted or qualified by something appearing in another part of the deed. Covenant-qualified by context.

Examples.—In a conveyance, covenants for title were restricted, by an agreement in a remote part of the deed, to acts done by the covenantor himself; *Brown v. Brown*, 1 Lev. 57.

In a separation deed, a covenant by the husband to pay an annuity of £250 to the wife during her life was restricted by a recital that he had agreed to pay her an

(a) See an American book on Covenants for Title by Mr. W. H. Rawls.

annuity of £250 out of his salary as a searcher so long as he should hold the situation; *Hesse v. Albert*, 3 M. & Ry. 406.

A lease contained a covenant by the lessee for the payment of rent, and also of interest on it if it should be in arrear for three quarters, and a covenant by a surety that the lessee should at all times well and truly pay the rent at the respective days therein before mentioned, and also interest, and should duly perform all the covenants, and that in case the lessee should neglect to pay the rent, &c., for forty days, the surety would pay it on demand. *Held*, that the surety was not liable before the end of the forty days, nor before demand, the latter words restraining the former; *Sicklemore v. Thistleton*, 6 M. & S. 9.

In a lease, a covenant by the lessee to repair at all times as occasion should require, and at furthest within three months after notice, was held to be a covenant to repair only after occasion, and three months' notice; *Horsfall v. Testar*, 1 J. B. Moo. 89.

Where a deed contains two covenants by the same covenantor, both of which cannot be performed, they are necessarily dependent; *Hemans v. Picciotto*, 1 C. B. N. S. 646.

In *Martyn v. M'Namara*, 4 Dr. & War. 411, Sugden, C., seems to have been of opinion that the generality of a covenant by A. with X. was qualified by a restricted covenant *in pari materiâ* by A. & B. with Y.

Ambiguous
words.

It must, however, be remembered that an absolute covenant will not be cut down by ambiguous words; Sugd. V. & P. (14th ed.) 605; and accordingly, where a vendor covenanted "that he was seised of a good estate in fee according to the indenture made to him by W., his vendor," it was held that the covenant was absolute, and that the reference to the conveyance by W. served only to denote the limitation and quality of the estate, and not the defeasibleness or indefeasibleness of the title; *Cooke v. Founds*, 1 Lev. 40: 1 Keb. 95. But see *Delmer v. M'Cabe*, 14 Ir. C. L. R. 377.

Participle—
"to be."

As to the qualification of a covenant by a participial clause, or the words "to be," following; see *ante*, p. 420.

Rule 171.—The words “but that, &c.,” following “But that,” a covenant, will be construed as part of and as a qualification of it.

The condition of a bond was, whereas the defendant had assigned a lease for years to the plaintiff, he had not done any act to disturb the possession of the plaintiff, whereby the assignment might be impaired, hindered, or frustrated, but that the plaintiff should quietly hold and enjoy the same premises without any disturbance by the defendant or any other person. *Held*, that the words “but that, &c.,” referred to the premises of the condition, and meant that the lease should be enjoyed without disturbance by any person or persons by act done or to be done by the defendant; *Broughton v. Conway*, F. Moo. 58; S. C., Dy. 240a.

Covenant by lessor that he had not done any act to prejudice the lease, but that the lessee should enjoy it against all persons. *Held*, that the words “but that,” &c., refer to the first words “for any act done by the lessor, &c. ;” *Gervis v. Peade*, Cro. El. 615; S. C., *sub nom. Peles & Jervies’ Case*, Dyer, 240a, margin.

Whether qualifying words in one covenant affect another covenant.

Where there are several covenants by the same covenantor, and one of them contains words restricting its own generality, as, for instance, “notwithstanding any act of the covenantor,” but the others contain no such qualifying words, the question arises whether the restrictive or qualifying words apply only to the covenant in which they are contained, or to the other covenants as well. It was formerly thought that if a restrictive or qualifying clause were in the first or last part of a sentence, or at the beginning of the first, or at the end of the last sentence, which in good sense might be applied to one and the other, it should extend to both sentences; but

otherwise if the clause were placed in the middle of one or two sentences; and the rule was stated to this effect in the judgment in *Gainsford v. Griffith*, 1 Wms. Saund. 60 (p. 67, ed. 1871); but the learned editor there says: "It is questionable whether much regard would now be paid to this mode of construction. The chief object of courts of law at present is to discover the true meaning of the parties, and to construe the covenants accordingly. As far as the difference above laid down would tend to find out the intention of the parties, so far it would now be adopted, and no farther." And the rule is expressly denied by Burrough, J., in *Nind v. Marshall*, 3 J.B. Moore, at 720; S. C., 1 Brod. & Bing. 319, where the remarks of Lord Mansfield, C.J., in *Kingston v. Preston*, cited Dougl. 689 (and *ante*, p. 460), are cited as laying down the true rule; and see *per* Dallas, C.J., *Foord v. Wilson*, 8 Taunt. 543; *Howell v. Richards*, 11 East, 633; *Kean v. Strong*, 9 Ir. L. R. 74.

Upon this subject Lord St. Leonards has (*Sugd. V. & P.* (14th ed.), Ch. 15, s. 3, p. 605), laid down the four following propositions; viz. :—

1. "Where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct."

2. "Where the *first* covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or the covenants be inconsistent, or unless there appear something to connect the general covenant with the restrictive covenant, or unless there are words in the covenant of themselves amounting to a qualification" (*ib.*, p. 607).

3. "As, on the one hand, a subsequent limited covenant does not restrain a preceding general covenant, so, on the other, a preceding general covenant will not enlarge a subsequent limited covenant" (*ib.*, p. 608).

4. "Where the covenants are of divers natures, and concern different things, restrictive words added to one

shall not control the 'generality of the others, although they all relate to the same land" (*ib.*, p. 609).

On these propositions Mr. Dart (V. & P., 5th ed., 790) remarks that "the first . . . seems to be warranted by the authorities. The second proposition is perhaps hardly accurate; for although a prior general covenant will not, it appears, be restrained by a subsequent covenant having a different object, yet, where two covenants relate to the same object, restrictive words in the second may, it seems, control the generality of the first. The third and fourth propositions seem to be unimpeachable." See Platt, Cov., Pt. 3, Ch. 11, s. 7, pp. 355, *et seq.*

The following rule appears to include all Lord St. Leonards' propositions as emended by Mr. Dart, and also some cases which do not fall under them.

Rule 172.—If one covenant be restricted or qualified, all other covenants, *in pari materia*, whether implied or express, are also restricted or qualified; but restrictive or qualifying words added to one covenant do not restrict or qualify other covenants, whether implied or express, *in dispari materia*.

See Platt on Cov., pp. 364, 375.

The view stated in Rawle on Covenants, p. 505, is as follows:—"The class of cases which may be said to be based upon *Browning v. Wright*, 2 Bos. & Pul. 13, appear to decide that where the instrument contains one or more general or unlimited covenants, which are connected with, or refer to, and have the same object as, one or more preceding limited covenants so as to join the latter with the former, it will be inferred that the covenantor intended that all the covenants should be restricted to his own acts or the acts of those claiming under him, and the preceding limited covenants will qualify and restrain the general ones; in other words, when it clearly appears that

the covenants are as it were cast in one mould, all having the same extent, Courts will not pick out one of them in which the limitation is less strongly or distinctly expressed than in the others, and upon it fasten on the covenantor a general liability. In the absence, however, of any such direct connection with a reference to each other as would clearly lead to the above conclusion, when the limited covenants belong to a different class, or rather, have a different object from the unlimited ones, they will be held to produce no effect upon each other, and the former will not qualify the latter."

"Demise."

The only case which does not support the rule is *Milner v. Horton*, McClel. 647, in which it was held that words restricting the covenant for quiet enjoyment also restricted the covenants for title, and which case, it may be remarked, is also contrary to the second of Lord St. Leonards' propositions as emended by Mr. Dart, and also to his fourth proposition, and is expressly overruled by *Smith v. Compton*, 3 B. & Ad. 189, where Lord Tenterden, C. J., said:—"We have considered *Milner v. Horton* again since the argument, and we cannot feel ourselves bound by its authority." The case of *Line v. Stephenson*, 6 Sco. 447; on app., 7 Sc. 69; S. C., 4 Bing. N. S. 678; on app., 5 Bing. N. S. 188: where it was held that the express covenant for quiet enjoyment restricted not only the implied absolute covenant to that effect created by the word "demise," but also the implied absolute covenant for title created by the same word can hardly be considered as contravening the rule, as the decision proceeds upon the ground that if the implied operation of the word "demise" is restricted at all, it must be restricted for every purpose, and cannot be held to be restricted when implying covenants for quiet enjoyment, and unrestricted when implying covenants for title.

In *Kean v. Strong*, 9 Ir. L. R. 74, it was held by Crampton, J., that an unqualified covenant to renew a lease was not cut down by a qualified covenant for quiet enjoyment, the covenants not being connected with each other. His lordship said (p. 82):—"It would be against

principle to hold that an implied covenant should qualify an express unqualified covenant, or that one distinct express covenant should qualify another express covenant neither grammatically nor substantially connected with the former. I cannot, therefore, yield to the argument which would qualify the express unqualified covenant to renew by the terms of the covenant for quiet enjoyment, a covenant which, in the deed, is separated from the former by several distinct and independent covenants: and, indeed, it may be added that two such covenants, one the covenant to renew, unqualified, and the other, the covenant for quiet enjoyment, limited to the acts of the covenantor, may well and do often co-exist in the same deed." S. C., in error, *Strong v. Kean*, 10 Ir. L. R. 137.

The most usual opportunity for the application of the rule is in the construction of the group of clauses in a purchase deed, which are usually, though inaccurately, called the covenants for title. These consist of (1) the covenant for title strictly so called (a covenant now usually omitted), (2) the covenant for right to convey, (3) the covenant for quiet enjoyment, (4) the covenant against incumbrances, and (5) the covenant for further assurance: and it has been decided that the covenants for title and for right to convey have the same object, but that they have an object different from that of the covenant against incumbrances.

Covenants for title may be either general or absolute, *i.e.*, against the acts, &c., of the whole world, and so extending to all paramount titles and incumbrances, or limited, *i.e.*, against the acts of named persons, *e.g.*, the covenantor himself only, or the covenantor and his ancestors, &c., and so extending only to defects of title or incumbrances created by such named persons.

"The covenant for title and the covenant for right to convey are indeed what is somewhat improperly called synonymous covenants; they are, however, connected covenants, generally of the same import and effect, and directed to one and the same object; and the qualifying

Covenant
for quiet
enjoyment
distinguished
from cove-
nants for
title and for
right to
convey.

language of the one may therefore properly enough be considered as virtually transferred, to and included in the other of them. But the covenant for quiet enjoyment is of a materially different import, and directed to a distinct object. The covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey The covenant for quiet enjoyment is an assurance against the consequences of a defective title, and of any disturbances thereupon (c). For the purpose of this covenant and the indemnity it affords, it is immaterial in what respects and by what means or by whose acts the eviction of the grantee or his heir takes place: if he be lawfully evicted the grantor stipulates to indemnify him at all events. And it is perfectly consistent with reason and good sense that a cautious grantor should stipulate in a more restrained and limited manner for the particular description of title which he purports to convey, than for quiet enjoyment. He may suspect or even know that his title is in strictness of law in some degree imperfect; but he may at the same time know that it has not become so by any act of his own, and he may likewise know that the imperfection is not of such a nature as to afford any reasonable chance of disturbance whatever to those who should take under it; he may therefore very readily take upon him an indemnity against an event which he considers as next to impossible, whilst he chooses to avoid a responsibility for the strict legal perfection of his title to the estate, in case it should be found at any future period to have been liable to some exception at the time of his conveyance. He may have a moral certainty that the existing imperfections will be effectually removed by the lapse of a short period of time, or by the happening of certain immediately then impending or expectant events of death or the like; but these imperfections, though cured so as to alleviate any risk of disturbance to the grantee, could never be cured

(c) See per Kelly, C.B., *Spoor v. Green*, L. R. 9 Ex. at p. 116.

by any subsequent event, so as to save the breach of his covenant for an originally absolute and indefeasible title. The same prudence, therefore, which might require the qualification of one of these covenants might not require the same qualification in the other of them, affected as it is by different considerations, and addressed to a different object ;" *per* Lord Ellenborough, C. J., *Howell v. Richards*, 11 East, 642.

In *Norman v. Foster*, 1 Mod. 101, Hale, J., said : " If I covenant that I have a lawful right to grant, and that you shall enjoy, notwithstanding any claiming under me, these are two several covenants, and the first is general and not qualified by the second." And so said Wylde, J., and that one covenant went to the title, and the other to the possession ; S. C., 3 Keb. 246.

A covenant for right to convey extends both to the covenantor's title, and to his capacity to convey ; so that a covenant by a husband that he and his wife had good right to convey was broken by her being under age ; *Nash v. Ashton*, T. Jo. 195.

Examples of the first branch of the rule.—Restricted covenant for seisin, followed by absolute covenant for right to convey ; *held*, that the latter covenant was qualified ; " for if he was seised in fee, he had a right to sell, and when by the first covenant he covenants against his own acts, it cannot be intended that immediately by another covenant to the same effect he would covenant against all the world ;" *Nervin v. Munns*, 3 Lev. 46.

Conveyance in fee with warranty against the vendor and his heirs ; qualified covenant by the vendor for seisin, followed by absolute covenant for right to convey ; *held*, that the latter was qualified ; *Browning v. Wright*, 2 Bos. & Pull. 13. The remarks of Lord Eldon, C. J., as to the effect of covenants for title are most instructive. He says, " It is certainly true that (*d*) the words of a covenant are to be taken most strongly against the covenantor ; but that must be qualified by the observation that a

Vendor
entitled by
descent or
devise.

due regard must be paid to the intention of the parties as collected from the whole context of the instrument If a man purchase an estate of inheritance, and afterwards sell it, it is to be understood, *primâ facie*, that he sells the estate as he received it; and the purchaser takes the premises granted by him with covenants against his acts. If the vendor has taken by descent, he covenants against his acts and those of his ancestors; and if by devise, it is not unusual for him to covenant against the acts of the devisor as well as his own. In fact, he says, 'I sell this land in the same plight that I received it, and not in any degree made worse by me.' It was argued that, if this were so, a man who has only an estate for life might convey an estate in fee, and yet not be liable to the purchaser. This seems at first to involve a degree of injustice, but it all depends on the fact, whether the vendor be really putting the purchaser in the same situation in which he stood himself. If he has bought an estate in fee, and at the time of the resale, has but an estate for life, it must have been reduced to that estate by his own act, and in that case, the purchaser will be protected by the vendor's covenants against any act done by himself. But if the defect in his title depend upon the acts of those who had the estate before him, and he honestly but ignorantly proposes to another person to stand in his situation, neither hardship nor injustice can ensue. *Primâ facie*, in the conveyance of an estate of inheritance, we are led to expect no other covenants than those which guard against the acts of the vendor and his heirs. With respect to the conveyance of leasehold estates, this is not always so, and there is an obvious reason why this should not be so. Some of the cases rest on the distinction between freehold and leasehold property. All the muniments of a freehold estate, and everything which can illustrate the title, is in possession of the vendor; but this is seldom the case with respect to leaseholds. With regard to many estates it would be next to impossible to show anything but the lease itself; the vendors could not produce

the muniments of their estates. It sometimes happens, therefore, that parties require covenants in assignments of this kind of property which are not required in conveyances of freehold ; such as, an absolute covenant that the vendor holds a valid and indefeasible lease."

In the assignment of a lease the vendor covenanted that he had not done, &c., any act, &c., whereby, &c., the premises were incumbered, &c., and that for and notwithstanding any such act, &c., the lease was valid, and that he had good right to assign. *Held*, that the covenant for right to assign was restricted ; *Foord v. Wilson*, 2 J. B. Moore, 592 ; S. C., 8 Taunt. 548.

In another assignment of a lease the covenants were that notwithstanding any act of the assignor, the lease was valid ; and further that it should be lawful for the assignee to enter and enjoy during the term without lawful disturbance by the assignor, his executors, administrators, or assigns, or any of them, or any other person or persons whomsoever, having or lawfully claiming any estate, right, or interest in the premises, and that, free, &c., from all former and other gifts, &c., whatsoever made, done, or permitted by the assignor, his executors, and administrators. Then followed a qualified covenant for further assurance. It was held (*dissentiente Park, J.*) that the covenant for quiet enjoyment was qualified, not by the words in the other covenants, as has been sometimes said, but by the concluding words "and that free," &c., from all incumbrances created by the assignor himself ; *Nind v. Marshall*, 3 J. B. Moore, 703 ; S. C., 1 Brod. & B. 819. See this case discussed in *Platt, Cov.* 373 ; *Rawle, Cov.* 509.

L., being entitled to a term of eleven years if C. should so long live, by indenture reciting the demise to him for eleven years, but not stating the term to be determinable on C.'s death, assigned the term to S., habendum for eleven years, and covenanted with S. that, notwithstanding any act by him done or knowingly suffered or omitted, the lease was valid, and that the same, and the term of eleven years therein expressed were respectively

in full effect, and in no wise become void, &c., otherwise than by effluxion of time, and also that for and notwithstanding any such act, &c., he had right to assign, with a covenant for quiet enjoyment during the term without disturbance by L. or any one rightfully claiming through him. C. was dead before the date of the assignment. *Held*, that the covenant that the lease and term were in full effect was restricted to the acts of the vendor, &c.; and that, therefore, the determination of the term by the death of C. was not a breach; *Stannard v. Forbes*, 6 Ad. & E. 572; S. C., 1 Nev. & Per. 633.

"Demise" (c). In *Nokes' Case*, 4 Rep. 80 b; S. C., *Nokes v. James*, Cro. Eliz. 674; *Merrill v. Frame*, 4 Taunt. 329; and *Line v. Stephenson*, 6 Sco. 447; on app., 7 Sco. 69; S. C., 4 Bing. N. C. 678; 5 Bing. N. C. 183; an express covenant for quiet enjoyment was held to qualify the generality of the covenant to the same effect implied in the word "demise." See *ante*, p. 472, and *Deering v. Farrington*, 1 Mod. 118.

Covenant that certain lands conveyed to the plaintiff for her jointure "are of a certain value, and shall so continue, notwithstanding any act done or to be done by" the covenantor; *held*, that the restriction applied to both covenants; *Rich v. Rich*, Cro. El. 43.

Condition for bond to be void "if he were seised in fee the day of the obligation made of certain lands, and if said lands should be discharged of all incumbrances made by him except the jointure of his wife." *Held*, that the words "except, &c.," applied to both covenants; *Woodyard v. Dannock*, Cro. Eliz. 762.

In a lease to two lessees, they "jointly and severally covenanted in manner following, viz.:" then followed a string of covenants in respect of the working of a colliery; after these followed a covenant by the lessor, and then a proviso "that it was thereby declared by and between the said parties," and the lessor covenanted that the lessees might sell certain coal, they, the lessees (not

(c) As to the covenants implied by the word "demise," see *ante*, p. 422.

saying and each of them), their executors, &c., paying and accounting to the lessor, &c. It was held that the implied covenant to pay contained in the proviso was joint and several by reason of the introductory words, though a covenant by the lessor was interposed; *Duke of Northumberland v. Errington*, 5 T. R. 522.

Examples of the last Branch of the Rule.—It has been held that the generality of a covenant for quiet enjoyment was not restricted by a qualified covenant for title; *Young v. Raincock*, 7 C. B. 310; *Howell v. Richards*, 11 East, 688, where Lord Ellenborough, C. J., said (at p. 648): "In looking at the case of *Browning v. Wright*, 2 Bos. & Pull. 18, in which almost all the cases on the subject are collected and considered, I do not find any case in which it is held that the covenant for quiet enjoyment is all one with the covenant for title, or parcel of that covenant." Conversely, that the generality* of the covenant for title was not restrained by a qualified covenant for quiet enjoyment; *Smith v. Compton*, 3 B. & Ad. 189; and *Norman v. Foster*, 1 Mod. 101, ante, p. 475. So a covenant in the assignment of a lease that the lease was good was not restricted by a qualified covenant for quiet enjoyment; *Gainsford v. Griffith*, 1 Wms. Saund. 58; S. C., 2 Keb. 76, 201, 213; 1 Sid. 328; or by qualified covenants against incumbrances, for quiet enjoyment, or further assurance; *Barton v. Fitzgerald*, 15 East, 530; and a covenant, in the assignment of a share in a patent, for right to assign was not restrained by a subsequent covenant "that he had not by any means, directly or indirectly, forfeited the right or authority that he might have over the same;" *Hesse v. Stevenson*, 3 Bos. & Pull. 565.

A covenant by a purchaser to indemnify the vendor from certain rents was held not to be restricted by the covenant to pay them being restricted to the time the purchaser was in possession; *Crossfield v. Morrison*, 13 Jur. 565; S. C., 7 C. B. 286.

Where A. covenanted to pay certain annuities and to indemnify the vendor against them, it was held that these

*Covenants
in dispari
materia.*

were two separate covenants, the former of which was broken by non-payment, though the vendor was not asked to pay them; *Saward v. Austin*, 10 J. B. Moo. 55.

In *Trenshard v. Hoskins*, Winch. 91, Litt. Rep. 62, 65, 185, 208, the covenants were that vendors were seised in fee, and that they or one of them had good right to convey, and that there was no reversion or remainder to the king by any act done by them. Notwithstanding the statement in Platt on Covenants, 376, that it is doubtful how the case was decided, citing 1 Wms. Saund. 60 (note), and 1 Sid. 328, it appears that the decision on appeal was for the plaintiff (Litt. Rep. 208), *i.e.*, that the qualifying words did not restrain the first covenants.

Covenant by lessee "that he would from time to time during the term, after three months' monition, sufficiently repair, and at the end of the term leave it sufficiently repaired." *Held*, that the clause to leave it well repaired at the end of the term was distinct, and did not depend on the previous clause; *Harslet v. Butcher*, Cro. Jac. 644.

Covenants in a conveyance of a manor by A. that he was seised in fee notwithstanding any act done by him or any of his ancestors, and that no reversion was in the king or any other, and that the manor was then of a certain annual value, and that the plaintiff should enjoy free from incumbrances by him or any of his ancestors. *Held*, that the covenant as to value was a distinct and unrestricted covenant; *Crayford v. Crayford*, Cro. Car. 106.

Covenants in conveyance by A. that he was seised in fee notwithstanding any act done by him, &c., and that the lands were of a certain annual value. *Held*, that the covenant as to value was an absolute unrestricted covenant; *Hughes v. Bennett*, Cro. Car. 495; 1 W. Jo. 408.

Restrictive
words rejected
and the con-
text.

According to Rule 17 (*ante*, p. 78), restrictive words may be altogether rejected if inconsistent with another part of the covenant. Thus, in a case where, on disso-

Tisdale v. Essex, Hob. 84; S. C., F. Moo. 861; 1 Rol. R. 397; *Dudley v. Folliott*, 8 T. R. 584; *Watkeys v. De Lancey*, 4 Eng. 854; *Seddon v. Senate*, 13 East, 63 at 69; *Wotton v. Hele*, 2 Wms. Saund. 175n. (ed. 1871, p. 524;) S. C., *Wootton v. Heal*, 1 Mod. 66, 290; S. C., 1 Lev. 301; 1 Sid. 466; 2 Keb. 684, 703, 709, 723; *Hall v. City of London Brewery Co., Limited*, 2 B. & S. 737; *Jeffryes v. Evans*, 19 C. B. N. S. 246.

Observation.—Of course the covenant may be so worded as to extend to tortious disturbances, as in *Chaplain v. Southgate*, 10 Mod. 384, where the covenant was for enjoyment “against all claiming or pretending to claim any right:” S. C., *Southgate v. Chaplin*, 1 Com. Rep. 230; see *Hunt v. Allen*, Winch. 25.

First Exception.—Where the disturbances, &c., are those of covenantor himself, or of him and his heirs or executors, the covenant extends to unlawful disturbances.

It was held in *Davis v. Sacheverell*, 1 Rol. Abr. 429, pl. 7, that a lessor’s covenant against lawful disturbance by the lessor is not broken by his entry as a mere trespasser on the lessee; but subsequently a distinction was taken between a tortious entry by a stranger and by the covenantor himself; and it is now admitted law that the covenantor cannot plead that his entry was unlawful in order to avoid the consequences of his own wrongful act; for, as against the covenantor himself, the Court will not consider the word “lawful;” *Platt, Cov.* 319, citing *Cave v. Brookesby*, W. Jo. 360; *Tisdale v. Essex*, Hob. 84; *Penning v. Plat*, Cro. Jac. 383; *Corus v. —*, Cro. El. 544; *Andrew’s Case, of Gray’s Inn*, Cro. El. 214. See also Sugd. V. & P. 14th ed. 600.

Examples.—*Lloyd v. Tomkies*, 1 T. R. 671; *Crosse v. Younge*, 2 Show. 425 (in both these cases the acts done by the covenantor amounted to a claim of title by him); *Ratcliff v. —*, Brownl. 80 (where the entry was by the executors); *Andrews v. Paradise*, 8 Mod. 319, where the covenantor erected a gate across a way leading to the close which he had conveyed; see also *Hunt v. Allen*,

Covenant
extended to
tortious acts.

Covenant
against acts
of covenantor,
&c.

Winch. 25. *Contra*, where the entry was for sporting; per Lord Ellenborough, C.J., *Seddon v. Senate*, 18 East, p. 72. See also *Penn v. Glover*, Cro. El. 451.

Covenants
against acts of
specified
person.

Second Exception.—Where the disturbances, &c., are those of a specified person they extend to all his acts, both lawful and unlawful. See *Shep. Touch.* 166, cited *ante*, p. 483.

Examples.—*Foster v. Mapes*, Cro. El. 212; *Lucy v. Leviston*, Freem. K. B. 103; S. C., 3 Keb. 163; *Nash v. Palmer*, 5 M. & S. 874; *Fowle v. Welsh*, 1 B. & C. 29; S. C., 2 D. & Ry. 133; see other cases collected in *Platt on Covenants*, 317.

Recital.

Observation.—A recital may show that the covenant is intended to apply to the acts of a particular person; *Perry v. Edwards*, 1 Stra. 400.

Disturbance
caused by
covenantee's
own act.

It need hardly be observed that a covenant for quiet enjoyment is not broken when the disturbance, &c., is the natural consequence of the covenantee's own act or default.

“All the judges agreed that when a man binds himself and his heirs to warranty, they are not bound to warrant new titles of actions accruing through the feoffee or any other after the warranty made, but only such titles as are *in esse* at the time of the warranty made. And also here the heir, who is executor and plaintiff in this action, is the cause of the breach of the condition, whereof he shall not himself take advantage so as to give himself an action by his own act;” *Executors of Grenelife v. W—*, Dy. 42a; see 42b. The action in this case was on the warranty on the sale of a copyhold, and the lord entered for rent falling due after the sale. See to the same effect, *Dyer*, 30a, where the covenant was for enjoyment “without interruption of any one.”*

In *Morgan v. Hunt*, 2 Vent. 213, the defendant leased a house to the plaintiff with an absolute covenant for quiet enjoyment: *held*, that by obtaining an injunction

against the plaintiff for ploughing up meadows the defendant had not broken his covenant. This case appears to have been decided on the ground that the disturbance was not in estate or title.

Construction of Special Words.

Covenant to hold "clear of" (*inter alia*) all rents; ^{"Rents."} held, that the covenantee ought to be discharged of all quit rents falling due after his conveyance, "for a quit rent is a rent;" *Hammond v. Hill*, 1 Com. Rep. 180.

Covenant that lessee should hold land "during the term," "without interruption, and discharged from tithes," and further, "if the tithes were recovered against him *during the term*," to recoup him. ^{"During the term."} After the term, an action was brought against lessee for tithes which accrued due *during the term*. Held, that this was within the words of the covenant; *Lanning v. Lovering*, Cro. Eliz. 916.

In *Evans v. Vaughan*, 4 B. & C. 261; S. C., 6 Dow. & Ry. 349, where a tenant for life demised for a term of years, it was held that the words "during the said term" meant during the term which the lessor purported to grant, and not merely a term determinable on the death of the lessor.

"The word 'acts' means something done by the ^{"Acts."} person against whose acts the covenant is made, and the word 'means' has a similar meaning, something proceeding from the person covenanting," or the person against whose acts the covenant is made; *Spencer v. Marriott*, 1 B. & C. 457; 2 D. & Ry. 665. In that case, the mesne lessor omitted to inform her lessee that there was a clause in the original lease prohibiting the carrying on of trade, and the lessee underlet to a tenant who was evicted for doing so. This was held to be no breach of the mesne lessor's covenant against eviction by or from her or by or through her acts, means, right, title, forfeiture, privity, or procurement. ^{"Means."}

See, to the same effect, *Dennett v. Atherton*, L. R. 7

Q. B. 316; where the question was whether a decree in Chancery restricting a particular use of the land by reason of a covenant of the lessor, but not otherwise interfering with the title, was a breach of the covenant for quiet enjoyment. See *ante*, p. 482.

But if a lessee, subject to a condition of re-entry on non-payment of rent, underlet and covenant for quiet enjoyment "without the impeachment of him or of any other occasioned by his impediment, interruption, means, procurement, or consent," and the sub-lessee is ejected for default of his lessor in paying the rent reserved by the original lease, this is a breach of the covenant: *Stevenson v. Powell*, 1 Bulstr. 182.

"Means and procurement."

But "'means and procurement' have a large extent" (Palmer, 340); so that in *Butler v. Swinnerton*, 2 Rol. Rep. 286; S. C., Palm. 338; Cro. Jac. 656; where a husband procured a conveyance to himself, remainder to his wife, it was held that the wife claimed "by the means" of the husband, "although she claimed by title derived from another."

"Neglect and default."

"A neglect and a default seem to imply something more than the mere want of discretion with respect to his [*i.e.*, the covenantor's] own interests; something like the breach of a duty or legal obligation existing at the time; these words, in their proper sense implying the not doing some act to secure his title which he ought to have done, and which he had the power to do; and the not preventing or avoiding some danger to the title, which he might have prevented or avoided;" *per* Tindal, C. J., *Woodhouse v. Jenkins*, 9 Bing. 431, at p. 441; S. C., 2 Moo. & Sc. 599.

"Default," quit rents accrued before conveyance to purchaser.

Covenant in conveyance in fee, for quiet enjoyment, "without any action, &c., by" defendant, or those claiming under him, or by or through his or their "acts, means, default," &c. Held, that a breach was well assigned in respect of certain quit rents in arrear at the time of the conveyance, though not stated to have accrued while the covenantor was owner of the premises, on the ground that it was owing to his "default"

that they remained unpaid ; *Howes v. Brushfield*, 3 East, 491.

Lord St. Leonards observes on this case (Sugd. V. & P., 14th ed. 602) that the argument of the Court would apply to a mortgage or any other incumbrance created by a former owner, and adds a caution as to applying this decision to cases arising in practice.

It has been held that a covenant for quiet enjoyment, "quietly and clearly acquitted of and from all grants, &c., rentcharges," &c., extends to a quit rent payable to the lord of the manor *ratione tenuræ*, although not in arrear at the time of conveyance ; *Hammond v. Hill*, Comyns, Rep. 180 ; see *Lanning v. Lovering*, Cro. Eliz. 916, stated *ante*, p. 487.

It is not a "neglect or default to accept a title with knowledge that it is defeasible, even from persons who have it in their power to make it absolute ;" *Woodhouse v. Jenkins*, 9 Bing. 481 ; S. C., 2 Moo. & Sc. 599. In that case a lessee, who held under a lease granted by a tenant for life and remainderman in tail with notice of their title, granted an underlease with a covenant against ejectionment of him, his heirs, executors, &c., "or by any other person or persons lawfully claiming or to claim by, from, or under him, them, or any of them, or by his, their, or any of their acts, means, consent, neglect, default, privity, or procurement ;" and the underlessee was ejected by a remainderman in fee. The tenant in tail having died without issue : *Held*, that the covenant was not broken ; and Tindal, C. J., said (at p. 441), "No act is done by the lessor ; no consent is given to the eviction ; there is no privity, no procurement."

There is a dictum of Lord Loughborough, C., in *Lady Cavan v. Pulteney*, 2 Ves. Jun. 544 ; S. C., 3 Ves. 384 ; to the effect that a lessor who, reciting that he was seised in fee, covenanted for quiet enjoyment against himself, or by his default, &c., and who always had it in his power by an easy act, as suffering a recovery, to make himself owner of the land which he leased, would be liable as for his default if he neglected to do so and his tenants

were ejected by the remaindermen; on which Lord St. Leonards observes (Sugd. V. & P., 14th ed. 608) that "The ground of this opinion must have been that the eviction was owing to the *default* of the lessor in not suffering a recovery."

"Permit and suffer."

"The words 'permitting and suffering' do not bear the same meaning as 'knowing of and being privy to;' the meaning of them is that the defendant [the covenantor] should not concur in any act over which he had a control;" *per* Bayley, J., *Hobson v. Middleton*, 6 B. & C. 295, at p. 303. And "the covenant extends to such permissive acts only as have, through the permission, an operative effect in charging the estate;" *per* Holroyd, J., *ibid.* at p. 304; S. C., 9 D. & R. 249; where it was held that a covenant by the vendor's dower trustee, that he had not "permitted or suffered," &c., was broken by his having previously conveyed his estate away, but not broken by his being a party to a conveyance whereby the vendor made a mortgage.'

"Suffer."

But where a lessor was bound to "suffer" his lessee to enjoy, "and that without interruption by himself or any other," it was held that an entry on the lessee under an elder title was no breach, unless the lessor actually procured the disturbance; *Anon.*, Dy. 255a, pl. 4.

"Suffer,"
charging
order.

In *Roffey v. Bent*, L. R. 3 Eq. 759, Lord Romilly, M. R., said, "the word 'suffer' . . . may, undoubtedly, be used in an active sense; but when the words 'shall do or suffer any act' are used, it is to be understood as meaning to endure or sustain, and to apply to something being done *in invitum*;" and consequently, *held*, that a charging order on a fund was an act suffered by a person whereby he lost his interest in a fund.

"Permit."

A covenant by defendant to permit the plaintiff to sow clover among the defendant's barley is not broken by the defendant sowing his barley without notice to the plaintiff, for the defendant does not thereby prevent the plaintiff from also sowing; *Hughes v. Richman*, 1 Cowp. 125.

Who are persons "claiming under" the covenantor.

Covenant for quiet enjoyment, against the acts of "any person or persons claiming or to claim by, from, or under" the lessor, in a lease of land which was limited to him for life, remainder to trustees to secure a jointure of £500 for his wife, with remainders over, and a joint power in the lessor and his wife to revoke and appoint new uses. The power of revocation was exercised, new uses appointed, and a person taking under the appointment evicted the lessee. It was held that "As the husband was a necessary party to the second declaration of uses by which the estate was limited to the evictor, the evictor certainly claimed under him within the meaning of the covenant. Undoubtedly the husband had covenanted against his own acts, and the new limitations were created by one of his acts;" *Hurd v. Fletcher*, 1 Doug. 43.

Appointee
under prior
power.

It has been held that a covenant for quiet enjoyment against all persons "claiming by, from or under" the covenantor, is broken by the entry of a prior appointee under a joint exercise of a power by A. B. and the covenantor; *Calvert v. Sebright*, 15 Beav. 156; or by entry of the mortgagees of a term created before the lease with the concurrence of the covenantor, and assigned to the mortgagees with his concurrence, though the estate did not pass from him; *Carpenter v. Parker*, 3 C. B. N. S. 206; 27 L. J. N. S., C. P. 78.

Prior ap-
pointee.

Prior mort-
gage with
concurrence
of covenantor.

In *Anderson v. Oppenheimer*, 5 Q. B. D. 602 (at p. 607), Brett, L. J. (referring to *Andrews v. Paradise*, 8 Mod. 818; *Shaw v. Stenton*, 2 H. & N. 858; and *Calvert v. Sebright*, 15 Beav. 156), said, "In the cases which have been cited to us, an authority to do an act had been given by the lessor before the granting of the lease, and afterwards an act had been done pursuant to that authority It was, therefore, an act for which the lessor was responsible and the act was done during the enjoyment by the lessee." But in that case it was held that the covenant was prospective, and did not

Where cove-
nant prospec-
tive only.

extend to the consequences of an act done by the lessor before the demise.

But the covenant may be so worded as to extend to past acts. Thus where a man in 1666 covenanted for quiet enjoyment for nine years from 1664, a plea that the lessee had not been disturbed *at and post* the sealing of the indenture was held bad; *Lewis v. Hellior* or *Helliqr*, 2 Keb. 291, pl. 78; 377, pl. 38.

Distress for
land tax,
due prior to
demise.

But it has been held that a distress for land tax due from the covenantor prior to a demise is not a breach of a covenant for quiet enjoyment, without any disturbance of or by the lessor "or any other person lawfully claiming or to claim from or under him;" for "the plaintiff's quiet enjoyment had not been disturbed by any one claiming by, from, or under the defendant, but by some one claiming against him;" *per* Lord Denman, C. J.; *Stanley v. Hayes*, 2 Gale & D. 411; 3 Q. B. 105.

Tenant in tail.

A tenant in tail is a person claiming under the covenantor, who settled the land on himself for life, remainder to the tenant in tail; *Evans v. Vaughan*, 4 B. & C. 261; S. C., 6 Dow. & Ry. 349.

Resettlement.

A., being seised of an undivided moiety of a piece of land, settled it on himself for life, remainder to his eldest son in tail, and subsequently leased it, with a covenant for quiet enjoyment against any acts of himself, his heirs, or assigns, "or any other person lawfully claiming by, from, or under him;" and then on his eldest son's marriage the land was settled to A. for life, remainder to his son for life, remainder to such of his son's sons as his son should appoint; *held*, that a grandson, to whom his son had appointed it, claimed under A.; *Steele v. Mitchell*, 2 Dr. & Wal. 568; 3 Ir. Eq. R. 1.

See further, as to disturbances of the covenantee by persons claiming under grants by the covenantor prior to his covenant; *Blatchford v. Mayor of Plymouth*, 3 Bing. N. C. 691; *Thackeray v. Wood*, 5 B. & S. 325; S. C., 6 B. & S. 766.

Dower.

A man's widow claims under him in respect of her dower, but his mother does not; *Anon.*, Godb. 393.

The covenant for quiet enjoyment extends to every thing that is appurtenant or incident to the grant to which it relates: *e.g.*, a right of way of necessity over the covenantor's other ground; *Morris v. Edgington*, 3 Taunt. 24; *Andrews v. Paradise*, 8 Mod. 318. Things appurtenant, &c.

Covenant for Further Assurance (a).

In a covenant to do all "reasonable acts" for further assurance, "a reasonable act means such an act as the law requires, and if it be an unnecessary act, it is not a reasonable act, or one which would be required by law;" *per* Wood, B., *Warn v. Bickford*, 9 Pri. at p. 51; Sugd. V. & P., 14th ed. 613; see Platt, Cov. 342, Dart, V. & P. 787; Rawle, Cov., ch. vii., p. 196. Act must be necessary;

The act required must be practicable. As to illness, lunacy, or death of the covenantor, whereby the act required ceases to be reasonable or practicable, see *Anon.*, F. Moo. 124, pl. 270; *Nash v. Aston*, T. Jo. 195; S. C., Skin. 42; *Pet and Calley's Case*, 1 Leon. 304; Rawle, Cov. 197. and practicable.

If there be by the covenant a time limited within which acts of further assurance are to be done, the purchaser must make request within the time named; *Nash v. Aston*, T. Jo. 195; S. C., Skin. 42; it is sufficient if he makes a general request; *Pulsey v. Neuson*, Yelv. 44; 1 Brownl. 84; Moore, 682; even if the assurance is to be such as shall satisfy the purchaser's counsel; *Baker v. Bulstrode*, 2 Lev. 95; S. C., T. Ray. 232. The case is differently reported in 1 Mod. 104. Where time for performance is limited.

Sometimes the covenant is to make "such further assurance as counsel shall advise;" Sugd. V. & P., 14th ed. 614; in this case the purchaser must tender the intended assurance to the covenantor; *Higginbottom's Case*, 5 Rep. 19b; *Bennet's Case*, Cro. El. 9; here the purchaser himself, though learned in the law, cannot advise; *Rosewel's Case*, 5 Rep. 19b; and the counsel is the purchaser's "As counsel shall advise."

(a) See now the C. A., 1881, s. 7.

counsel; *Higginbottom's Case*, 5 Rep. 196; Platt, Cov. 349; Rawle, Cov., ch. vii. 195, note (4), where it is remarked that by the usual modern form the assurance may be devised by the purchaser or his counsel. The form of covenant implied by C. A. 1881, s. 7 (1) A., has no reference to counsel, &c.

What acts
within the
covenant.

It has been held that under a covenant for further assurance the covenantee can require the execution of a duplicate conveyance where he has handed over the original to a purchaser from him of part of the estate; Sugd. V. & P., 14th ed. 613; *Napper v. Lord Allington*, 1 Eq. Ca. Abr. 166, pl. 4, but this decision was reversed on rehearing on another point; Dart, V. & P. 788; Platt, Cov. 344, 345 (a).

It seems doubtful whether the covenantor can be required to execute a covenant to produce title-deeds to the purchaser; *Fain v. Ayers*, 2 Sim. & St. 533; reported differently 1 Russ. 259 n. (but see Sugd. V. & P., 14th ed. p. 438, where it is said that this case did not decide the point); *Hallett v. Middleton*, 1 Russ. 256, 257; but Mr. Dart (V. & P., 5th ed. 787, note (b)) says, "*et quere*;" and in Platt, Cov. 347 foll., it is said that considerable doubt exists; or to give fresh covenants for title; *Coles v. Kinder*, Cro. Jac. 571; *Pudsey v. Newsam*, Yelv. 44; but see Dart, V. & P. 787, note (c), who says this point is not clear; 9 Jarm. Conv. by Sw. 401; *Lassels v. Catterton*, 1 Mod. 67.

Note the distinction "between mere agreements to convey by reasonable assurance, which are held to carry with them a right to covenants for title in the deed of conveyance, and a right to the insertion of those covenants in the deed of further assurance itself;" Rawle, 202; Sugd. V. & P., 14th ed. 615.

Tenants in
tail.

As to further assurances by tenants in tail, see *Darvis v. Tollemache*, 2 Jur. N. S. 1181; S. C., 28 L. T. O. S. 188; Platt, Cov. 345, citing *Edwards v. Applebee*, 2 Bro. C. C. 652 note; *Ex parte Wills*, 2 Cox, 233.

(a) *Bennett v. Ingoldsby*, Finch, Rep. 262, does not appear to have been decided on the construction of the covenant.

But see the Fines and Recoveries Act, 8 & 4 Wm. 4, c. 74, s. 47, by which courts of equity are prevented from giving any effect to dispositions by tenants in tail, which in courts of law would not be effectual, *i.e.*, which are not perfected in the manner required by that Act. See Fry on Spec. Perf., 2nd ed. 45.

Where a tenant in tail made a mortgage containing a covenant for further assurance, and became bankrupt, it was held that his assignees in bankruptcy must execute further assurances, though the bankrupt had not barred; *Pye v. Daubuz*, 3 Bro. C. C. 595; Sugd. V. & P., 14th ed. 618; but see Dart, V. & P. 5th ed. 787.

"If the title prove bad, and *the defect can be supplied by the vendor*, the purchaser may file a bill in equity for a specific performance of the covenant for further assurance. And a vendor who has sold a bad title will, under a covenant for further assurance, be compellable to convey any title which he may have acquired since the conveyance, although he actually purchased such title for valuable consideration;" Sugd. V. & P., 14th ed. 612, citing *Taylor v. Debar*, 1 Ch. Ca. 274; 2 Ch. Ca. 212; *Seabourne v. Powell*, 2 Vern. 11; Platt, Cov. 343; *Langford v. Pitt*, 2 P. Wms. 629; Dart, V. & P., 5th ed. 788, who cites *Otter v. Lord Vaux*, 2 K. & J. 650; 6 De G. M. & G. 638; but see *Davis v. Tollemache*, 2 Jur. N. S. 1181; S. C., 28 L. T. O. S. 188, stated *post*, p. 497; and Mr. Dart (V. & P. p. 808) observes that the right seems to exist independently of the covenant; see *Noel v. Bewley*, 3 Sim. 116; *Jennings v. Blencowe*, 2 Vern. 609.

But on the passage above cited from Sugd. V. & P. it has been remarked that "the language, unless carefully considered, might mislead;" that "it is undoubtedly correct if the covenant for further assurance is the only one in the deed, or if the other covenants are unlimited or general. But if the covenant for further assurance is, either expressly or by implication, limited

(a) See the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 56, sub-s. 5.

or restrained by other covenants, or by the grant itself (*Davis v. Tollemache*, 2 Jur. N. S. 1181 ; S. C., 28 L. T. O. S. 188, stated *post*, p. 497), then the remark would seem to have rather too broad an application ;" Rawle, Cov. 199, note (2), where it is also observed that *Taylor v. Debar* was clearly a case in which the conveyance of the after-acquired title was properly compellable, and that in *Seabourne v. Powell* there was not any covenant for further assurance.

"These cases (*viz.*, *Seabourne v. Powell*, *ubi supra* ; *Noel v. Bewley*, *ubi supra* ; and *Morse v. Faulkner*, 1 Anst. 11 ; 3 Swanst. 429 note) seem to me to establish this, that if a man sells an estate (and the principle is just the same if he grants his lands in mortgage, or creates an annuity issuing out of them) and the title is afterwards defeated, but subsequently he acquires the same lands under another title, there is an equity arising out of the contract to fasten it upon the new title ;" *per* Sugden, C., *Jones v. Kearney*, 1 Dru. & War. at p. 159.

On this it is observed in Dart, V. & P. 5th ed. 809 :—"In applying this rule the word *estate* must be strictly construed ; for evidently no such equity could exist where the contract had been for the purchase of a professedly contingent interest at a price fixed with a view to the contingency."

"The covenant for further assurance in a deed is a covenant intended to give full effect and operation to the estate and interest conveyed by the deed. Where it is sought to extend the operation of a general covenant of that kind to the execution of an instrument which would bar a title in others which would continue but for the execution of the instrument sought to be executed, I have always understood that an express stipulation to that effect is necessary For that reason, it has, so far as I know, never been considered that a covenant for further assurance implied, without regard to the other covenants in the deed, a covenant to levy a fine, or to suffer a recovery, or to surrender a copyhold. The utmost extent to which the Court has gone with reference

to covenants for further assurance has been to extend their operation to that very estate and interest which are conveyed by the deed. If a tenant in tail conveys in fee simple upon a recital that he is entitled to the fee, and the instrument contains no covenant to suffer a recovery, or to levy a fine, the Court, finding an express contract which relates to an estate in fee, which is purported to be conveyed by the instruments, extends the operation of the covenant for further assurance so as to apply to the subject-matter of the grant, which it is in the power of the grantor to complete by an instrument, although that instrument may bar and conclude the title of other persons I can find no contract in this deed for enlarging the estate of the grantor to any extent; and I conceive that, unless there be words in the instrument which can show it was intended that the covenant for further assurance should extend to enlarging the estate conveyed, and to barring an interest in other persons than the grantor, the Court is not justified in resorting to the extraordinary jurisdiction for specific performance to compel the grantor to execute an assurance of a kind that was not, and could not, from the form of the instrument, be thought to be in his contemplation at the time when the grant by him was made;” *per* Stuart, V.-C., *Davis v. Tollemache*, 2 Jur. N. S. 1181; S. C., 28 L. T. (O. S.) 188. Tenant in tail.

“Under this covenant the heir might call for further assurances, even to levy a fine: he certainly might have called for the removal of a judgment or other incumbrances;” *per* Heath, J., *King v. Jones*, 5 Taunt. 427; S. C., 1 Marsh. 107; S. C. affd., *Jones v. King*, 4 M. & S. 188. On this Mr. Rawle (Cov. for Title, ch. vii., p. 198) observes: “It is conceived that this proposition must be taken with some qualification, depending either, first, on the scope of the other covenants in the deed, or, secondly, on the nature of the estate conveyed. For . . . all the other covenants for title are either general, *i.e.*, extending to *all* paramount titles and incumbrances, or limited, extending only to defects of title or incumbrances created by the vendor. But the covenant for

further assurance has in general the same form of expression, whether the other covenants which accompany it are general or limited; it is an undertaking that the vendor will execute such further assurance as may be deemed necessary by the purchaser. If the other covenants in the deed are general, if their breach will be caused by reason of an incumbrance not created by the vendor, then it is conceived that the proposition is correct, and that the purchaser may, instead of suing at law upon his other covenants, invoke the aid of equity to remove the incumbrance. But if the other covenants are limited and the purchaser would therefore be without remedy at law upon them by reason of the incumbrance not having been created by the vendor, it is obvious that the vendor cannot be compelled to remove an incumbrance which he had not covenanted against."

Nature of
estate con-
veyed.

"So, too, the purchaser's right may depend on the nature of the estate conveyed. There is a class of cases (see *Clanrickard v. Sidney*, Hob. 273; *Delmer v. McCabe*, 14 Ir. C. L. R. 377) which decide that although the covenants for title may be general, yet, when the conveyance is but of a limited estate or interest, the covenants will themselves be restrained and limited to the estate conveyed. Under such circumstances it would be inequitable that the purchaser should, by virtue of a covenant for further assurance, require the conveyance to himself of any greater estate."

"It is obvious, therefore, that no more is meant than that where the covenants for title are not limited or restrained either by [*sic*; *quære* 'to'] the acts of the vendor or [by] the particular estate conveyed, the purchaser has a right, under the covenant for further assurance, to require the conveyance of a paramount title or the removal of an incumbrance; but where the other covenants are limited to the acts of the vendor, or restrained by any particular estate, the purchaser will have no right under this covenant to require the conveyance of any other estate, or the removal of an incumbrance not created by the vendor."

The cases which depend upon the covenant for ^{Estoppel.} further assurance must be distinguished from those which depend upon the rule (see *post*, p. 527), that if a man having a defective title purports to convey property for value, and afterwards acquires a good title, equity renders that good title available for supporting the conveyance.

In *Smith v. Baker*, 1 Y. & Coll. C. C. 223, A., supposing himself to be entitled to the fee simple, subject to his mother's life estate, conveyed it to trustees for the benefit of his creditors, with covenants for title and further assurance. In fact the mother was the owner in fee simple; and when, on her death it had descended to A., it was held that he must assure the estate so acquired by him. See also *Dart, V. & P.*, 5th ed. 809; *Noel v. Bewley*, 3 Sim. 103; which was doubted in *Smith v. Osborne*, 6 H. L. C. at p. 392.

See also *Spencer v. Boyes*, 4 Ves. 370, where copyholds were mortgaged to the plaintiff's testator as freeholds, and the bill was filed against the customary heir of the mortgagor praying a surrender to the use of the plaintiff.

Specific performance will be refused where the original conveyance itself is void: as if a man covenants to stand ^{Original conveyance void.} seised to the use of a mere stranger and to make further assurance; *Fursaker v. Robinson*, Prec. Ch. 475; *Gilb. Eq. R.* 189; *Abr. Eq.* 128; *Platt, Cov.* 353.

CHAPTER XXXI.

COVENANTS TO SETTLE PROPERTY.

Agreement that wife's other or after-acquired property "shall be settled" binds both husband and wife : Agreement that one party shall settle property does not bind the other : Effect of recitals : Covenant to settle wife's property by husband only—by both husband and wife : Exception of property settled to wife's separate use or "otherwise settled" : No expression of wish of person giving property to wife can exempt it from operation of covenant : Property over which the wife has power of appointment : "Shall become entitled" means during the coverture : "Is now entitled," or "at the time of the marriage shall be entitled" : Words descriptive of future acquisition only : where wife becomes entitled to property to which she had no title at the time of the marriage : property to which wife was entitled (1) in possession, (2) in remainder at the time of the settlement or marriage : reversionary interests falling into possession after determination of coverture : vested reversionary title accruing during coverture : contingent interest to which wife is entitled at date of settlement or marriage : Contingent interests acquired during coverture : Malins' Act : Married Women's Property Act, 1882 : Life interests : Property of named minimum value : Covenant to settle particular interest by a person who acquires a different interest : Infant wife : Election : Covenants to settle husband's property : Covenants to leave by will : Miscellaneous.

In determining the effect of a covenant for the settlement of a wife's property not specifically settled, the following questions arise for consideration, viz., (1) Are both the husband and wife bound, or which of them is bound, to perform the covenant? (2) What property is bound by the covenant?

We have seen (Rule 155, *ante*, p. 426) that "the rule is that where you have such words as 'it is hereby agreed and declared between and by the parties to these presents,' that some one will do an act, or make a payment, and that some one is a party to the deed, it is a covenant by him with the others, not a covenant by all of them. . . If we find that no act is to be done except by one of the parties, these words amount only to a covenant by that one party with the others;" *per* Jessel, M.R., *Dawes v. Tredwell*, 18 Ch. D., at p. 359. And see *per* Kindersley, V.-C., *Ramsden v. Smith*, 2 Drew. 307, 308, cited *ante*, p. 426. Effect of agreement and declaration by parties.

Now the agreement between the parties to a settlement as to the wife's after-acquired property, may be either (1) that such property "shall be settled," or (2) that *the husband, or wife, or both of them, shall settle it.*

Observation.—In settlements made after 1882, the covenant to settle is generally entered into by the wife alone; see the forms in 2 K. & E. Comp. 2nd ed., p. 477, and in Wolstenholme & Turner's Conveyancing Acts, 3rd ed., p. 229, where see the note.

Hence the following Rules:—

Rule 174.—An agreement and declaration that the wife's other or after-acquired property "*shall be settled,*" is binding on both husband and wife. Agreement that wife's property shall be settled.

Rule 175.—An agreement and declaration that *the husband shall settle, or concur with the wife in* Agreement that the husband alone

*shall settle
it (a).*

settling, her other or after-acquired property, does not bind the wife.

Observation.—The operation of either of these rules is not affected by the addition of a covenant by the husband only.

“In all the cases of clauses in marriage settlements as to the settlement of future property, three distinct questions arise: And . . . all the cases turn upon one or more of these different questions, namely—Whose covenant is it? Who is bound? Who has entered into the covenants? The second is, having ascertained who has entered into the covenant—By whom is the act to be done? And the third—What is the property which is included in the covenant, and is to be affected by the act to be done? . . . Now I apprehend that, whenever the covenant or agreement is simply and in terms the covenant and agreement of the husband, the husband only is bound; and some of the cases decided turn upon that distinction. But where the covenant in terms is not a mere exclusive covenant of the husband, but is an agreement between all the parties, which agreement, being under seal, is in point of fact a covenant by all the parties, then it is not merely limited to a covenant by the husband, but all parties who have entered into that agreement are bound to perform it.” . . . “In this case . . . there is a special covenant on the part of the husband, but, as it appears to me, not superseding the effect of that which is the general covenant comprised in the general agreement among all the parties. But although that is a general agreement, and in that sense a covenant . . . it does not mean that every party to the deed has bound himself and made himself responsible for the act to be done, because, as may be very justly observed, . . . trustees are under no responsibility that they will

*Agreement
between all
parties.*

(a) In settlements after 1882, the agreement might be that the wife alone should settle; in this case, the Rule and Observation would apply *mutatis mutandis*.

do the act to be done; or that, if it is not done, they will make good what ought to have been done. But the meaning of it is that these words express what [it] is the intention and agreement of all parties shall be done by somebody, but not at all meaning to express by whom the act is to be done which the parties have agreed and intended shall be done;" per Kindersley, V.-C., *Townshend v. Harrowby*, 27 L. J. N. S. Ch. 553; S. C., 4 Jur. N. S. 858; 6 W. R. 413.

In *Campbell v. Bainbridge*, L. R. 6 Eq. 269, the words being "It is hereby declared and agreed, and the said (husband) doth covenant that" the property should be settled, Stuart, V.-C., said:—"It seems to me very clear that where the covenant is by the husband alone, the words previously inserted, that 'it is hereby declared and agreed,' amount only to a declaration and agreement that all parties are agreed that the husband shall covenant. But where it is declared and agreed—that is, by all the parties, including the wife—that property which may come to her for her separate use, free from the control of her husband, shall be settled, the case is clear. . . . I cannot read the words of this clause without seeing that her separate property and her separate agreement are a substantial and integral part of this clause, and that it is an agreement by all the parties, including the wife, that the wife should do something." And the V.-C. then distinguished *Ramsden v. Smith*, 2 Drew. 298, where it was agreed and declared, and the said (husband) did thereby covenant that he the said (husband) would settle the property; and he remarked that, in that case, Kindersley, V.-C., "rested his judgment upon this, that the person who alone, according to the terms of the clause was to do anything, was the husband." See also *Smith v. Lucas*, 18 Ch. D. 531, at pp. 541, 542.

Examples.—(1) Agreement and declaration, and covenant by the husband only, that the property "shall be settled."—In *Butcher v. Butcher*, 14 Beav. 222, stated *post*, p. 522, the wife, after the husband's

death, was held bound to settle a reversionary chose in action to which she became entitled during the coverture, but which did not fall into possession until after the husband's death. This case was followed in *Re D'Estampes*, *D'Estampes v. Hankey*, 32 W. R. 978, where the prior cases are reviewed, and *Reid v. Kenrick*, 3 W. R. 530 (S. C., 1 Jur. N. S. 897; 24 L. J. N. S. Ch. 503) is distinguished; see the latter case stated, *post*, on this page.

So, under a similar form of words, the wife was held bound to settle her separate property; *Willoughby v. Middleton*, 2 J. & H. 344; S. C., 6 L. T. N. S. 814 (more fully stated *per* Lord Selborne, C., in *Codrington v. Lindsay*, L. R. 8 Ch. p. 590); *Campbell v. Bainbridge*, L. R. 6 Eq. 269. See also *Townshend v. Harrowby*, 4 Jur. N. S. 353; S. C., 27 L. J. N. S. Ch. 556; 6 W. R. 416.

In *Stevens v. Van Voorst*, 17 Beav. 305, it was agreed and declared between and by the parties, and the husband covenanted, that they the said husband *and wife and each of them*, would settle the wife's after-acquired property. *Held*, that this was a covenant by the wife as well as the husband [and therefore property acquired by her after the husband's death must be settled by her] (b).

Examples (2).—Agreement and declaration, and covenant by the husband only, that “he will settle, or concur with the wife in settling,” the property.—The wife was held not bound to settle property given to her separate use, in *Ramsden v. Smith*, 2 Drew. 298; *Dawes v. Tredwell*, 18 Ch. D. 354.

In *Reid v. Kenrick*, 1 Jur. N. S. 897 (S. C., 24 L. J. N. S. Ch. 503; 3 W. R. 530; S. C., 25 L. T. (O. S.) 193), the words were “It is hereby agreed and declared by and between the said parties hereto, and the said R. (husband), doth hereby covenant, that “the after-acquired property ‘shall be and remain, and be the said R.

(b) The part of the decision in brackets is not law; see *post*, Rule 178, p. 510.

will permit and suffer the same to be and remain' upon the trusts of the settlement, and that he the said R. will pay, transfer, and deliver over, and join with the said (wife) in assigning, conveying, and assuring" such property. Stuart, V.-C., distinguished *Stevens v. Van Voorst* (stated *ante*, p. 504), and held that it was impossible to say that, upon the construction of the instrument, there was any covenant on the part of the wife, and accordingly that a reversionary chose in action which fell into possession after the husband's death, was not bound. (*See quære*. The terms of the settlement are peculiar, and seem to amount to an agreement by all parties, first, that the property should be settled, and secondly, that the husband should settle it; so that it would appear to be a case of conflict between Rule 174 and Rule 175; and to amount to an authority that, where there is such a conflict, the latter Rule must prevail; a conclusion which is supported by Rule 27, *ante*, p. 113.) See also *Lec v. Lec*, 4 Ch. D. 175, stated *post*, p. 520.

Effect of Recitals.

In cases falling under Rule 174, a recital in general terms of an agreement "that the husband shall settle," the wife's future property, will not restrict the generality of the agreement in the operative part of the deed; *Willoughby v. Middleton*, 2 J. & H. 344; and in cases falling under Rule 175, a recital in general terms of an agreement that the wife's future property "shall be settled," will not enlarge a covenant by the husband in the operative part that "he will settle" it; *Hammond v. Hammond*, 19 Beav. 29; *Young v. Smith*, L. R. 1 Eq. 180; S. C., 35 Beav. 87; *Dawes v. Tredwell*, 18 Ch. D. 354; provided that in each case the operative words are unambiguous. See *ante*, Rule 36, p. 129; Rule 37, p. 132; but consider *Caldwell v. Fellowes*, L. R. 9 Eq. 410.

Covenants by husband only, or by both husband and wife, without any general declaration and agreement between the parties.

Sometimes there are no words of general agreement between the parties, the form being simply "The said (husband) hereby covenants," or "The said (husband) and (wife) hereby covenant," &c.

"It is quite settled that a covenant by the husband alone to settle the after-acquired property of the wife does not bind her separate property, but that if the covenant be by both, then it does bind it. Again this covenant can only settle property over which the wife has a power of disposition, for if it is settled by an instrument which prohibits anticipation, the covenant to settle would be inoperative;" *per Romilly, M.R., Corentry v. Coventry*, 32 Beav. 614.

Examples. — (1) Covenant by husband only. —
The wife is not bound to settle the following:—

Separate
estate.

(1) Property to which she becomes entitled for her separate use; *Douglas v. Congreve*, 1 Keen, 410; S. C., 6 L. J. N. S. Ch. 51; *Thornton v. Bright*, 6 L. J. N. S. Ch. 121; *Travers v. Travers*, 2 Beav. 179; *Drury v. Scott*, 4 Y. & C. Ex. 264; *Grey v. Stuart*, 2 Giff. 398; S. C., 30 L. J. Ch. 884; *Hammond v. Hammond*, 19 Beav. 29; *Gataker v. Reynardson*, 13 W. R. 487; S. C., 12 L. T. N. S. 134.

Reversionary
property.

(2) Reversionary interests which do not fall into possession during the coverture, so that the husband cannot reduce them into possession; *Young v. Smith*, 35 Beav. 87.

Equitable
choses in
action.

(3) Equitable choses in action to which the wife becomes entitled in possession during the coverture, but which are not reduced into possession by the husband during the coverture; *Re Webb's Trusts*, 46 L. J. Ch. 769.

A husband covenanted to settle, when required, one moiety of the wife's reversionary interests under a will; after the death of the tenant for life, he reduced one moiety into possession, and gave a release for it, but

never settled it; the other moiety remained with his consent standing in the names of the executors until he died, in the lifetime of the wife, having by his will given all his property to her. *Held*, that the wife was not bound to settle the moiety which had not been assigned by the executors; *Cramer v. Moore*, 3 Sm. & G. 141. Stuart, V.-C., said:—"There is nothing strong enough to defeat her title. There was no assignment upon any trust, no covenant by her, and the articles are merely executory, and are not binding upon her." S. C., 3 W. R. 347; 25 L. T. (O. S.) 81. It should be remarked that in this case the contest was between the wife and her next of kin, who would have become entitled under the ultimate trust in the settlement in default of appointment by the wife.

Examples.—(2) Covenants by both husband and wife.—The wife is bound to settle property to which she becomes entitled for her separate use; *Towney v. Ward*, 1 Beav. 568; *Re Allnutt, Pott v. Brassey*, 22 Ch. D. 275; unless it be settled without power of anticipation; *Smith v. Lucas*, 18 Ch. D. 531; and see a *dictum* of Romilly, M.R., in *Coventry v. Coventry*, 32 Beav. 614, cited *ante*, p. 506; or unless the husband's interest only in the wife's property is covenanted to be settled; *Brooks v. Keith*, 2 Dr. & Sm. 462. Separate estate.

In *Townshend v. Harrowby*, 4 Jur. N. S. 353; S. C., 27 L. J. Ch. 553; 6 W. R. 413; 31 L. T. 39, it was held that life interests whether for the wife's separate use or not, are not intended to be included so as to fall into the trust property as capital. Restraint on anticipation.

In *Brooks v. Keith*, 2 Dr. & Sm. 462, where the wife became entitled to a life interest in leaseholds, with a proviso of forfeiture on alienation, Kindersley, V.-C., was inclined to think that an assignment on the trusts of the settlement would not be a forfeiture, but he declined to order the wife to run the risk; see this discussed per Chitty, J., *Re Allnutt, Pott v. Brassey*, 22 Ch. D. at p. 280. Life interest
forfeitable on
alienation.

In *Milford v. Peile*, 17 Beav. 602, where the covenant "Absolute use."

was to settle "all property which should come to her absolutely, and not bound by any trust or provision otherwise than for her absolute use," it was held that property bequeathed to the wife for her separate use was bound; *S. C.*, 2 W. R. 181.

Exception of
property
settled to
separate use.

Where there was an exception of property "already settled to her separate use," it was held that property subsequently bequeathed to the wife for her separate use fell within the exception; *Coventry v. Coventry*, 32 Beav. 612; *Whitgreave v. Whitgreave*, 33 Beav. 532; but such an exception, contained in a settlement before 1883, does not apply to property to which she becomes entitled after 1882, and which is not affected by an express trust for her separate use; *Re Stonor's Trusts*, 24 Ch. D. 195. See 45 & 46 Vict. c. 75, s. 19.

Exception of
property other-
wise settled.

If the covenant expressly excepts property which shall be "otherwise settled," property given to the wife for her separate use falls within the exception; *Kane v. Kane*, 16 Ch. D. 207.

Property
given with
direction that
it is not to be
bound by
covenant.

Rule 176.—Where a covenant has been entered into for the settlement of the after-acquired property of a married woman, and a gift is afterwards made to her of such a nature as to come within the words of the covenant, no expression of the intention of the donor that it is not to be settled will exclude it from the operation of the covenant.

In *Re Mainwaring's Settlement*, L. R. 2 Eq. at p. 495, Wood, V.-C., seems to have considered that the intention of the donor could govern the construction of the covenant; but this opinion is erroneous (as offending against Rule 8, *ante*, p. 36), and his judgment was not founded on it. And it has been disapproved of by Chitty, J., in *Re Allnutt, Pott v. Brassey*, 22 Ch. D. 275; and by Cotton, Bowen, and Fry, L.JJ., in *Scholfield v. Spooner*, 26 Ch. D. 94, where Bowen, L.J., says, at p. 101:—"Whether property falls within a covenant to settle after-

acquired property or not, must turn, as it seems to me, upon the construction of the covenant. There has been laid down a canon with reference to the construction of such covenants, that when you find the property does not fit the trusts of the settlement, then you may assume as a consequence that it was not intended to come within the covenant at all. That seems to be good sense. But that rule itself is only, to my mind, a rule of construction; and the question must be whether, on the true construction of the covenant, the particular property falls within it or not. If that is the right view, it cannot be material to consider the intention with which after-acquired property has been given. A gift is not the less a gift because the donor intends that it shall not follow the bargain which the party to whom it was given has made as to its devolution. You may look at the way in which it is given to see if it is a gift coming within the terms of the covenant to settle, but no declarations of intention as to what are to be the consequences can have any effect."

In the same case, Fry, L.J., at p. 102, says:—"The question is one of considerable moment, viz., whether the intention of the donor can operate to take a gift out of the operation of the covenant, when, but for such expression of intention, the gift would have fallen within its operation. . . . Now, on principle, it appears to me to be impossible that that question can be answered in the affirmative. It seems to me that we must inquire, first, what is the construction of the covenant to settle; next, what is the gift; and that, if the gift comes within the scope of the covenant, then no expression of intention on the part of the donor can take it out of the operation of the covenant. In construing the gift we must consider what is the subject-matter of the gift, and what are the limitations subject to which it is made; and if it is found that those limitations are inconsistent with the limitations of the covenant to settle, then the Court may well conclude that the subject-matter of the gift does not come within the scope of the covenant. The inten-

tion of the donor of the gift cannot, in my judgment, be regarded, except so far as it bears on the nature of the gift he has made."

Property over
which wife
has power of
appointment.

Rule 177.—Property over which the wife has merely a power of appointment is not bound by the covenant, unless expressly included therein; *Ewart v. Ewart*, 11 Ha. 276; *Townshend v. Harrowby*, 4 Jur. N. S. 353; S. C., 27 L. J. Ch. 553; 6 W. R. 413; *Bower v. Smith*, L. R. 11 Eq. 279 (c); S. C., 19 W. R. 399; 40 L. J. Ch. 194. But if the wife appoint to herself an interest that falls within the covenant, such interest will be bound; *Ewart v. Ewart*, 11 Ha. 276.

"Shall
become
entitled"
means during
coverture.

Rule 178.—In the absence of special words, a covenant to settle property "to which the intended wife shall become entitled" will be construed to mean "shall become entitled during the coverture;" *Re Edwards*, L. R. 9 Ch. 97, approving *Carter v. Carter*, L. R. 8. Eq. 551, and *Dickinson v. Dillwyn*, L. R. 8 Eq. 546; and overruling on this point *Stevens v. Van Voorst*, 17 Beav. 305.

"The primary object of a covenant to settle the future property of a wife is to prevent its falling under the sole control of the husband, and it therefore, *prima facie*, is to be supposed not to be intended to apply to property the wife's title to which does not accrue until after the husband's death;" *per James, L.J., Re Edwards*, L. R. 9 Ch. at p. 100.

In *Re Campbell's Policies*, 6 Ch. D. 686, where the rule was applied to a case in which the covenant related only to property coming from a specified source, Hall,

(c) See the remarks on this report in *Steward v. Poppleton*, W. N., 1877, No. 29.

V.-C., explains the reasons for the rule:—"The arguments which have been addressed to me, in favour of construing a clause like this to include property coming to the lady after the determination of the coverture, are not sufficient to induce the Court to extend its operation. On the contrary, I think that such a construction would in all probability not carry out the intention of the parties. It might have the effect of rendering impossible any settlement upon the children of a second marriage, and of leaving them totally unprovided for. A settlement upon a first marriage having such operation would be in the highest degree improvident; for the lady might soon become a widow, and thus, if the covenant were held to extend over the whole period of her life, all her fortune might go to the single child of a first marriage, to the entire exclusion of numerous children of a subsequent marriage."

In *Prebble v. Boghurst*, 1 Swanst. 309, where the condition of a bond on marriage was "If the said (*husband*) should at any time during his natural life be seised," &c., the words were given their natural meaning, and land of which he became seised after the death of his wife was held to be bound.

"*Is now entitled*"—"at the time of the marriage shall be entitled."

Rule 179.—Where the covenant includes property to which the wife "is now entitled," or "at the time of the marriage shall be entitled," all reversionary interests, whether vested or contingent, to which she is entitled at the date of the settlement or marriage, as the case may be, are bound.

The rule applies to a vested reversion; *Caldwell v. Vested Fellowes*, L. R. 9 Eq. 410; *Re Mackenzie's Settlement*, L. R. 2 Ch.345.

The rule was not followed in *Dering v. Kynaston*, L. R. 6 Eq. 210, where the wife was entitled to a remote estate.

vested remainder in tail, which was defeasible, and which did not fall into possession till after the coverture had determined. See on this case *per* Malins, V.-C., in *Agar v. George*, 2 Ch. D. 709; and *per* Jessel, M. R., in *Re Jackson's Will*, 13 Ch. D., at p. 196.

Contingent
interest.

It applies to a contingent interest, even if it do not fall into possession till after the termination of the coverture; *Agar v. George*, 2 Ch. D. 706; *Cornmell v. Keith*, 3 Ch. D. 767; and consider the judgment of Turner, L.J., in *Re Mackenzie's Settlement*, L. R. 2 Ch., at p. 348, where he says:—"The terms of the covenant are 'if she is,' or 'if she becomes, entitled to property of the value of £400 for any estate or interest whatsoever.' Could it be said that if she was entitled contingently, or under an executory devise or bequest, to property of a larger value, the covenant would not reach it?"

Defeasible
interest.

The rule applies to a reversionary interest liable to be divested by the exercise of a power of appointment; *Re Jackson's Will*, 13 Ch. D. 189; *Sweetapple v. Horlock*, 11 Ch. D. 745. But, on the other hand, where the wife was, at the time of the settlement, entitled to a vested reversionary interest liable to be divested by the exercise of a power of appointment, and the covenant contained words descriptive of both present and future property, and the property was appointed absolutely to her after the termination of the coverture, it was held not to be within the covenant, though the vested reversionary interest was within it; *Sweetapple v. Horlock*, 11 Ch. D. 745, overruling *Re Frowd's Settlement*, 4 N. R. 54; S. C., 10 L. T. N. S. 367. See Rule 183, *post*, p. 519; and Rule 188, *post*, p. 527. See also *Re D'Estampes, D'Estampes v. Hankey*, 32 W. R. 978.

Words descriptive of future acquisition only.

Where the words of the covenant describe only property to be acquired in future, *e.g.*, "property to which the wife shall become entitled," they clearly do not bind property to which the wife is already entitled in possession;

post, Rule 180, see Addenda; and they clearly do bind property which she acquires in immediate possession after the marriage, and to which she had no title of any kind at the date of the marriage; see *per* Wickens, V.-C., in *Re Clinton's Trust*, L. R. 13 Eq. 295, cited *infra*.

But greater difficulty arises in applying words of future acquisition to property in which the wife has already, at the time of the marriage, a reversionary interest which vests in possession, or a contingent interest which vests in interest only, during the coverture.

The governing principle of the cases seems to be that, in order to satisfy words of future acquisition, there must be, after the marriage and during the coverture, some change of title, or fresh acquisition of interest in the property in question.

In *Re Clinton's Trust*, L. R. 13 Eq. 295, the words being "if at any time or times after the solemnization of the said intended marriage, and during the joint lives of the said (husband) and (wife) they or either of them in her right shall . . . become entitled." Wickens, V.-C., (at p. 304), observed:—"The law on this subject is in a very embarrassing state, and the decisions are in fact irreconcilable. . . . It must be taken as clear on principle and authority, that such a covenant, where the words are future, does not affect present property. The judgment of James, V.-C., in *Re Pedder's Settlement Trusts*, L. R. 10 Eq. 585, represents, I conceive, quite accurately the law as deduced from the cases cited before him. There can be no doubt that a covenant like the present applies exclusively to interests which the parties may acquire a title to after marriage, distinct from those vested in them at the time of marriage, and that there must be some change or other in the title to the property after marriage in order to bring it within the covenant. This change is described in the covenant by the words 'become entitled to.' The expression 'become entitled to,' in these and most covenants of the sort, applies, I conceive, only to an acquisition of interest by the wife; and this may mean (1) an acquisition of property in:

There must be some change in title during coverture.

"Become entitled to."

which the wife had no interest at the time of the marriage, and which vests in her absolutely during the coverture ; or (2) an acquisition of property which she was entitled to in remainder at the time of marriage, and which vests in possession during the coverture ; or (3) an acquisition of property in which she had no interest at the time of the marriage, which vests in her by way of future title during the coverture, but does not vest in possession till it is determined. There can be no doubt that the first of these three classes is within the covenant: the difficulty arises with regard to the other two classes. Both of them cannot be included within the covenant, and the question is, which of them is, *prima facie*, to be considered as so included."

The titles, therefore, which may be acquired after the date of the marriage and during the coverture are:—(1) Acquisition in possession of property in which the wife had no interest at the date of the marriage ; (2) Acquisition in possession of property to which she had a title in reversion at that date ; (3) Acquisition of a reversionary title (vested or contingent) to property in which she had no interest at that date, and which does or does not fall into possession during the coverture.

As to class (3) there may be a further question, viz., whether there is a change of title sufficient to bring the property within the covenant where a contingent reversion becomes vested during the coverture.

Words of future acquisition bind property acquired in possession during coverture to which the wife had not title at the marriage.

Rule 180.—Property which the wife acquires in possession during coverture, and to which she had no title of any kind at the date of the marriage, is bound by the covenant where the subject-matter of the covenant is described by words of future acquisition only ; *Re Clinton's Trust*, L. R. 13 Eq. 295 ; cited *supra*, p. 513.

Words of future acquisition do not

Rule 181.—Property to which the wife is entitled in possession at the date of the settlement is not

bound by the covenant where the subject-matter of the covenant is described by words of future acquisition only; *Re Clinton's Trust*, L. R. 13 Eq. 295; cited *supra*, p. 613; but see Addenda.

had property of wife in possession at date of settlement.

"The words 'become entitled' mean 'become entitled either in possession or reversion;'" *per* Shadwell, V.-C., *Blythe v. Granville*, 13 Sim. at pp. 195-6.

"Become entitled."

"When you find the words 'shall become entitled,' you are always referring to some future interest, to the acquisition of some future title;" *per* Kindersley, V.-C., *Wilton v. Colville*, 3 Drew. at p. 624.

Accordingly, where the covenant was by the husband and wife, and the words were (p. 125):—"all such further or other portion or personal estate (if any) as shall during the life of the said (*wife*) become vested in or accrue to her, or as shall or may be assignable by the said (*husband*) and (*wife*) or either of them in law or equity, either for a vested or contingent interest;" *Hoare v. Hornby*, 2 Y. & C. C. C. 121; "all and singular the personal estate to which the said (*wife*) shall at any time or times become entitled;" *Otter v. Melvill*, 2 De Gex & Sm. 257; "if at any time or times during the said intended coverture the said (*husband* and *wife*) or either of them in her right, shall, by gift, descent, succession, or otherwise, become entitled to any real or personal estate;" *Archer v. Kelly*, 1 Dr. & Sm. 300; "all and singular the moneys, stocks, goods, and chattels, and other personal estate which at any time or times during the said intended marriage" the *wife* or the *husband* in her right, "shall become possessed of, or entitled to, by transmission, gift, or otherwise, and whether in possession or expectancy;" *Re Browne's Will*, L. R. 7 Eq. 281 (at p. 282); "in case any personal property shall at any time or times during the said intended coverture be given or bequeathed to, or in any manner vest in" the *wife* or the *husband* in her right; *ib.* at p. 283; it was held that property to which the wife was at the date of the settlement entitled in possession was not bound; and

that, although in *Otter v. Melvill* the husband and the trustees of the settlement were at the time of the marriage ignorant of the existence of the property, and that in *Re Browne's Will* the property was a tontine debenture.

The same construction was placed on covenants by the husband only where the words were "all and every the estate and effects, of what nature and kind soever, whether real or personal, to which the said (*wife*) at any time during the said intended coverture shall become seised, possessed of, or entitled unto;" *Wilton v. Colrin*, 3 Drew. 617; "if at any time or times during the said intended coverture, any real or personal estate shall descend, or devolve to, or vest in," the *wife* or the *husband* in her right; *Churchill v. Shepherd*, 33 Beav. 107.

In *James v. Durant*, 2 Beav. 177 (S. C., *sub nom.* *James v. James*, 9 L. J. N. S. Ch. 85), the words were: "In case the *wife* or any person or persons in trust for her or the *husband* in her right should at any time or times thereafter during their joint lives, become possessed of, interested in, or entitled to, any sum or sums of money or other personal property, estate, or effects whatsoever." It was held that personalty to which the wife was entitled in possession at the date of the marriage was bound, on the ground (following the reasoning in *Graffey v. Humpage*, 1 Beav. 46; on app. 3 Jur. 622) that by the marriage the husband acquired, in his wife's right, title to the property in question. It appears from the report of *James v. James* in the Law Journal that the wife, for herself, &c., and the husband, for himself, &c., covenanted that in case the wife "or the husband in her right should at any time or times thereafter during their joint lives become," &c. Lord Langdale, M. R., said that the words "at any time or times hereafter" could only be construed to mean "at any time or times after the execution of the settlement;" and by virtue of the marriage and in right of his wife the husband acquired the title to the property in question. But it is conceived that *James v. Durant* is not now law; see *Archer v. Kelly*, 1 Dr. & Sm. 300; *Churchill v. Sheppard*, 33 Beav.

107; *Re Clinton's Trust*, L. R. 18 Eq. 295, where Wickens, V.-C. (at p. 307), said that *James v. Durant* "could not be reconciled with" later cases of unimpeachable authority:" and also that *Graftey v. Humpage* was "a peculiar case, and only to be followed where the question is specifically the same;" but see Addenda.

Some confusion, however, has been occasioned by *Re Viant's Trusts*, L. R. 18 Eq. 436, where Bacon, V.-C., decided that where the covenant was to settle property "to which the wife or the husband in her right should during the coverture become entitled" the words of futurity were satisfied by the interest that the husband acquired by the marriage; and by *Hamilton v. James*, Ir. R. 11 Eq. 223, following *Re Viant's Trusts*, which decided that a sum of money lent to the husband by the wife before the marriage was bound by a covenant to settle personalty to which the wife or the husband in her right should become entitled; but see Addenda.

By a marriage settlement it was agreed that A., the husband, and all other necessary parties, should settle all property to which "he now is, or shall, during the intended coverture become entitled." At the time of his marriage he was in receipt of half-pay as a naval officer: but afterwards, during the coverture, he commuted it, and received the commutation money. *Held*, that the commutation money was not bound by the covenant; for the half-pay was not strictly "property," nor was it (at law) assignable property; and therefore it did not fall within the words of the covenant; and the fact of commuting, *i.e.* selling it, did not make it a new acquisition of title; *Churchill v. Denny*, L. R. 20 Eq. 534.

On the second marriage of B., a widow, she executed with the consent of J., her intended husband, a deed settling certain specified property. By an agreement dated the same day, reciting the settlement, and that the parties had agreed that any property which B. "may be entitled to," other than that included in the settlement, "should be settled" upon similar trusts, B. and J. covenanted "each with the other" that in case B. "shall be

entitled " to any property other than that comprised in the settlement, " the same shall be settled." *Held*, that the agreement applied only to property to which B. might afterwards become entitled, and not to any property to which she was entitled at the date of the agreement, but which was not included in the settlement; *Re Blockley, Blockley v. Blockley*, 49 L. T. 805; S. C., 32 W. R. 385.

Vested reversion falling into possession during coverture is bound.

Rule 182.—Where a vested remainder or reversionary interest, to which the wife is entitled at the date of the settlement, falls into possession during the coverture, it is bound by a covenant in which the property to be settled is described by words applicable to future acquisition only.

The Rule was applied where the words were:—"all the property of what nature or kind soever to which the wife shall during the coverture become entitled;" *Blythe v. Granville*, 13 Sim. 190; "in case, at any time or times hereafter during the coverture, any real or personal property and effects, of what nature or kind soever, shall descend, come to, or vest in, the wife or the husband in her right at law or in equity;" *Ex parte Blake*, 16 Beav. 468; "if at any time during the life of the wife, any real or personal estate should be given or devised, descend, or devolve, be bequeathed or come to her or to the husband in her right;" *Spring v. Pride*, 4 De G. J. & S. 395; "all such real and personal estate as, at any time during the said intended coverture, the wife or the husband in her right shall become entitled to, by descent, transmission, claim, devise, bequest, gift, donation, representation, purchase, or otherwise;" *Bradford v. Romney*, 30 Beav. 431; "if, at any time or times after the solemnization of the said intended marriage, and during the joint lives of the husband and wife, they or either of them in her right shall by gift, descent, succession, or otherwise howsoever, become entitled to any real or per-

sonal estate, property, or effects;" *Re Clinton's Trust*, L. R. 18 Eq. 295.

Rule 183.—Where a vested remainder or reversionary interest, to which the wife is entitled at the date of the settlement, does not fall into possession until after the determination of the coverture, it is not bound by a covenant in which the property to be settled is described by words applicable to future acquisition only.

Vested reversion, not falling into possession during coverture, not bound.

"The covenant provides that any property shall be settled to which the wife, or her husband in her right, should at any time or times during the coverture become beneficially entitled in possession or reversion, or in any manner whatever derivable directly or indirectly from a particular source. Inasmuch as the tenant for life outlived the wife, it is clear that *she* did not, nor did her husband in her right, during the coverture become entitled in possession to a fund which was hers in reversion before the marriage took place. It is equally clear that the husband, during the coverture, did not become entitled in right of his wife. His title accrued, not during the coverture, but afterwards, when he took out administration to his wife's estate. The sort of inchoate title that he had during the coverture, depending on the possibility of the property falling into possession during the coverture, really amounts to no property at all. Property such as this is not property to which the husband or the wife 'became entitled during the coverture;' " *per* Jessel, M. R., *Re Jones' Will*, 2 Ch. D. 362, where the wife was at the date of the marriage entitled to a reversionary interest in personalty which did not fall into possession till after her death.

In *Re Pedder's Settlement Trusts*, L. R. 10 Eq. 585, where James, V.-C., applied the rule to a vested remainder in real estate which did not fall into possession till after the termination of the coverture, he says:—

"The words of the covenant are words of futurity: 'shall during the coverture become seised or possessed of or entitled to;' and I find nothing to warrant a departure from the literal and natural meaning of the words. This is not property with regard to which it can be averred that the husband or wife did become 'seised or possessed of or entitled to' it 'during the coverture.' No seisin, no title accrued to either of them in respect of it during the coverture; hence the property does not satisfy the words of futurity in the covenant, and consequently was not included within it."

See *Re Clinton's Trust*, L. R. 18 Eq. 295 (Wickens, V.-C.) to the same effect.

Re Viant's Trusts, L. R. 18 Eq. 436, is not in accordance with the above cases, and the decision was disapproved of by Jessel, M. R., in *Re Jones' Will*, 2 Ch. D. 362.

It was at one time considered that, at all events where the reversionary interest was personalty, the change of interest caused by the marriage, which gave an inchoate interest in the property to the husband, was sufficient to satisfy the words "becoming entitled, &c."; and accordingly, that property of this description was bound whether it fell into possession after the death of the wife only (*Graffley v. Humpage*, 1 Beav. 46; *Re Viant's Trusts*, L. R. 18 Eq. 436), or after the deaths of both husband and wife (*Re Hughes' Trust*, 4 Gif. 432); but these cases must be considered as overruled.

The rule was applied to a post-nuptial settlement in *Wyndham's Trusts*, L. R. 1 Eq. 290, where the husband covenanted that "all real and personal estate and effects which shall or may at any time *hereafter during the joint lives* of the husband and wife *descend*, devolve upon, or be given, devised, or bequeathed to, or in trust for her" should be for her separate use (Wood, V.-C., distinguished *Graffley v. Humpage*, *supra*).

Reference should be made to *Lee v. Lee*, 4 Ch. D. 175, where, by ante-nuptial agreement, not under seal, signed by the intending husband and wife and the parents of the

wife, the parents agreed to appoint a share of certain real estate, which was subject to their life interests, and to the appointment of them and the survivor of them to the wife; and the husband agreed that "he will settle such share as the wife may take in her father and mother's marriage settlement either by appointment or in default of appointment." The wife's father, having survived her mother, released the power and granted the estate after his death, giving the wife a share. The wife predeceased the husband and left two children. The property being still reversionary, an action was brought by the husband and one of the children against the other child, the wife's heir-at-law, for specific performance of the agreement. *Held*, that the property in question was bound, as being specifically described, and because the wife having been a party to the agreement, thereby assented to the property being settled in a particular way.

Rule 184.—If the property be described by words of future acquisition only, and during the coverture the wife "become entitled" to a vested remainder or reversionary interest, even though it does not fall into possession till after the termination of the coverture, it will be bound by the covenant.

Reversionary
interest
accruing dur-
ing coverture.

Examples.—Covenant by the husband only, to settle "all the estate, property, and effects to which the *wife* or the *husband* in her right shall at any time or times during the intended coverture become seised or possessed of or entitled to, either at law or in equity under any gift, devise, or bequest in her favour by or on the part of her father;" the reversion was given to her by her father's will; *Hughes v. Young*, 32 L. J. N. S. Ch. 137; S. C., 1 N. R. 166; 9 Jur. N. S. 376.

Agreement and declaration and covenant by the husband only that "in case any personal estate, effects, and property shall at any time or times hereafter during the

intended coverture come to or vest in the *wife* or in the *husband* in her right," such property should be settled; *Butcher v. Butcher*, 14 Beav. 222.

See also *Dickinson v. Dillwyn*, L. R. 8 Eq. 546; *Cowper Smith v. Anstey*, W. N. 1877, p. 28; see also *Townshend v. Harrouby*, 4 Jur. N. S. 353, where it was held on the words of the settlement that the remainder would or would not be bound according as the husband or wife survived; S. C., 27 L. J. N. S. Ch. 553; 6 W. R. 413.

Contingent
interest
vesting in
possession
during cover-
ture.

Rule 185.—Where the property included in the covenant is described by words applicable to future acquisition only, property in which the wife has a contingent interest at the date of the settlement or of the marriage, is bound by the covenant if it fall into possession during the coverture, but not otherwise.

Where the wife is entitled to a contingent interest at the time of the marriage, one of three events may happen.

- (1.) It may not vest in interest during the coverture.
- (2.) It may vest in interest and not in possession during the coverture.
- (3.) It may vest both in interest and possession during the coverture;

The rule states that in the two first cases the property, when described by words of futurity will not be bound, and that in the third case it will be bound by the covenant; but as to (2.) see *Observation infra*.

Accordingly, where the wife was at the date of the marriage entitled to a contingent interest in real estate (*Archer v. Kelly*, 1 Dr. & Sm. 300) or in real and personal estate (*Brooks v. Keith*, 1 Dr. & Sm. 462), the property, having fallen into possession during the coverture, was held to be bound by the covenant.

On the other hand, where a contingent interest to which the wife was entitled at the date of the marriage did not vest in interest until after the termination of

the coverture, it was held not to be bound; *Atcherley v. Du Moulin*, 2 K. & J, 186, where Wood, V.-C., said (p. 193): "The word 'entitled' might be large enough to include a contingent interest, if the other words of the sentence showed that it was to have that effect; but when I find the words are that whatever she should 'be or become entitled to during her coverture' is to be vested in the trustees (d) it is impossible to say that such a provision comprises anything more or other than what should so become her property as to admit of being dealt with upon the trusts of the settlement. It is very questionable whether such a covenant would comprehend even a reversionary interest. Certainly this contingent possibility is not within the words or spirit of the settlement."

Observation.—There may possibly be some doubt whether the rule applies where the contingent interest to which the wife was entitled at the time of the marriage vests in interest, but not in possession, during the coverture; but probably the rule does apply.

Contingent
interest
vesting in
interest during
coverture.

It may fairly be argued that in the absence of special words, the change from being contingent to being vested in interest is not "becoming entitled" within the meaning of the covenant, so that the wife will not have to assign the property to the trustees unless it falls into possession during the coverture, though she might possibly be unable to deal with it while it remains reversionary so as to defeat the settlement in the event of its falling into possession during the coverture.

The only case on this point is *Re Michell's Trusts*, 9 Ch. D. 5; which was decided in accordance with the rule, because "the husband was not able to settle it during the coverture. He could not dispose of it by

(d) As to the force of words referring to assurance or transfer to trustees, see also *per Wickens, V.-C., Re Clinton's Trust*, L. R. 13 Eq., at p. 306.

any means, nor could he and his wife together do so; it was not disposable; it was not property which could be effectually settled;" *per* Jessel, M.R., at p. 10. It should be observed that the instrument under which the wife took the reversionary interest was dated in 1825, so that the interest was not alienable by the married woman under Malins' Act, 20 & 21 Vict. c. 57, and, if the only reasons for the decision were those given by the Master of the Rolls, a different decision might be given in a case falling under Malins' Act, or the Married Women's Property Act, 1882. But Cotton, L.J., gives another reason, saying that the object of the covenant is to prevent the husband taking the property absolutely, and to bind it for the benefit of the wife and children.

Contingent Interest acquired during Coverture.

There is no decision as to the effect of the covenant describing the property by words of future acquisition only on a contingent interest which first accrues to the wife during the coverture; it appears to satisfy the words "shall become entitled;" see *Agar v. George*, 2 Ch. D. 706; *Cornmell v. Kath*, 3 Ch. D. 767; *Re Mackenzie's Settlement*, L. R. 2 Ch. 315, cited *ante*, p. 512; though possibly the reasoning in *Re Mitchell's Trusts*, 9 Ch. D. 5, *ante*, p. 523, might be followed.

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Cases falling within Malins' Act (20 & 21 Vict. c. 57).

In cases not falling within the Married Women's Property Act, 1882, but falling within Malins' Act, it might probably be held that though the wife, if not a covenanting party, would not be bound to convey the property while it was reversionary to the trustees of the settlement; still that she would not be allowed to convey the property while it was reversionary to any one else, and that her husband would not be allowed to concur in a conveyance by her in such a manner as to

prevent the property from being transferred to the trustees on its falling into possession.

Cases falling within the Married Women's Property Act, 1882.

Cases falling within the Married Women's Property Act, 1882, are of two classes:—(1.) Where the marriage was before 1883, and the married woman's title accrues after 1882; (2.) Where the marriage was after 1882. In either of these cases the property will not be bound unless the covenant binds the wife.

Life Interests.

Rule 186.—The presumption is that the covenant Life interest or income. does not extend to a life interest, or to income.

The rule was applied to income given to the wife for her separate use in *Townshend v. Harrowby*, 4 Jur. (N. S.) 353; S. C., 27 L. J. (N. S.) Ch. 553; *Duncan v. C'annan*, 21 Beav. 307; and *Forster v. Davies*, 4 De G. F. & J. 133.

(In the two last-mentioned cases the life interest was for separate use with restraint in anticipation.)

In *Lewis v. Madocks*, 17 Ves. 48, where the covenant Husband's property. was to settle the husband's after-acquired property, Lord Eldon, C. (at p. 55), said that he could not adopt the construction that annual produce, for instance, dividends of stock, was property acquired during the coverture in the sense of this bond; except only to the extent to which the husband himself might think proper to lay up that produce as capital: otherwise they would not be at liberty to spend a shilling.

In *St. Aubyn v. Humphreys*, 22 Beav. 175, and in *White v. Briggs*, 22 Beav. 176 (n), it was held that a life interest acquired by the husband, who had covenanted to settle his after-acquired property, was not bound by the covenant.

Named
minimum
value.

Rule 187.—Where the property to be settled is to be of a named minimum value, and the wife's interest is reversionary, the sum named means the value of the property itself when it falls into possession, not the value of the wife's reversion at the time of settlement.

See *Re Mackenzie's Settlement*, L. R. 2 Ch. 345; *Cornmell v. Keith*, 3 Ch. D. 767; and *Re Clinton's Trust*, L. R. 13 Eq. 295; where Wickens, V.-C., says (at p. 306):—"The property to be acquired is to be 'of the value' of £100, or upwards. That seems to me to mean the actual value, and not the estimated value of a remainder acquired during coverture, and not falling into possession till many years afterwards."

Amount left
in blank.

Where the amount is left in blank, there is not such uncertainty as to render the covenant void, Lord Cranworth, C., being of opinion that the covenant extended to all capital but not to income to which the settlor should become entitled; *Fyfe v. Arbuthnot*, 1 De G. & J. 406: S. C., 26 L. J. Ch. 646.

"At any one
time."

In *Hood v. Franklin*, L. R. 16 Eq. 496, it was held (following *Re Hooper's Trust*, 13 W. R. 710; S. C., 11 Jur. N. S. 479) that the words "at any one time," implied "from one and the same source." In neither of these cases had the wife any interest in either fund at the date of the settlement. But in *Mackenzie's Settlement*, L. R. 2 Ch. 345, where the wife was entitled at the date of the settlement to two different reversions which fell into possession at the same instant, it was held that, in estimating the value for the purpose of the covenant, the aggregate value of the two shares, and not the value of each share separately, must be taken.

Concurrent
appointments
of several
sums.

Where the wife took under several appointments made by herself on the same day in exercise of the same power, and the amount appointed by each deed was less than, though the aggregate sum exceeded, the minimum, it was held that the property was not bound; *Bower v. Smith*,

19 W. R. 399; S. C., L. R. 11 Eq. 279, where it is reported incorrectly; see *Steward v. Poppleton*, W. N. 1877, p. 29.

Covenant for settlement of wife's after-acquired property of the minimum value of £500. Prior to the date of the settlement, a bequest had been made to trustees of an annuity, to be applied wholly or partly for testator's widow, the surplus to be accumulated, and divided at her death among the testator's children, one of whom was the intended wife. The husband died before the time of distribution; and when that time arrived the wife's share amounted to over £500, but it had never amounted to that sum during the coverture; *held*, that it was not bound; *Re Welstead*, *Welstead v. Leeds*, 47 L. T. 331.

Increase of
value after
coverture
determined.

Notwithstanding the rule in equity, see *ante*, p. 499, that if a man contracts to convey, mortgage, or sell, certain property and afterwards acquires such a title as enables him to carry out his contract, he is bound to do so; *Taylor v. Debar*, 1 Ch. Ca. 274; S. C., sub nom. *Taylor v. Dabar*, 2 Ca. Ch. 212; *Seabourne v. Powell*, 2 Vern. 11; *Morse v. Faulkner*, 1 Ans. 11; S. C., 3 Swanst. 429, note; *Noel v. Bewley*, 3 Sim. 103; *Jones v. Kearney*, 1 Dr. & War. 134.

Rule 188.—If A. covenants to settle a particular interest in property, and afterwards becomes entitled to a different interest in that property, such interest is not bound by the covenant.

Where
covenantor
acquires a
different
interest.

Examples.—A. being possessed of a lease for years, covenanted in a deed making a family provision that, if he should die during the continuance of the term of the lease, his executors should assign the residue of the term to B. A. afterwards purchased the reversion in fee and died. *Held*, that the covenant did not preclude A. from purchasing the reversion, and that his executors were not liable as for breach of the covenant; *Williamson v. Butterfield*, 2 Bos. & P. 63.

A., being under her parents' marriage settlement tenant in tail in remainder of certain lands, expectant on the

failure of issue male of her brother, agreed in her own marriage settlement, which recited the former, that, "in case she shall become entitled to any such estate, part, or share, as aforesaid," it should be conveyed to the uses of the settlement. The brother suffered a recovery and died intestate, whereupon she inherited one-fourth of the lands as one of his four co-heiresses. *Held*, that the covenant did not affect the fee simple so coming to her by descent; *Tayleur v. Dickenson*, 1 Russ. 521.

A., being entitled under the will of B. to a contingent remainder in land, by settlement reciting his title, covenanted that when and so soon as "the said remainder" should become vested in him in possession, he would settle it. The lands were disentailed by tenants in tail under the prior limitations of the will, and ultimately came to A. by descent and devise from them: *held*, that A.'s covenant did not affect the fee simple thus acquired by him, inasmuch as he never acquired a vested interest in the remainder under the will of B.; *Smith v. Osborne*, 6 H. L. C. 375.

The five children of a testator were absolutely entitled to his residue. One of them, on her marriage, settled her fifth of such residue, and "all other her share by survivorship or otherwise, and all her right contingent, reversionary or other interest, possibility, claim, and demand therein." She afterwards became entitled to a further share by the death of a brother intestate. *Held*, that it was not included in the settlement; *Edwards v. Broughton*, 32 Beav. 667.

A. being entitled to an interest under a will in certain funds, by her marriage settlement assigned "all the share to which she then was or might become entitled by accruer, survivorship or otherwise" in the specified funds. *Held*, that a share in the funds taken by her under the will of her father, who had become entitled thereto, was not affected by the settlement; *Parkinson v. Dashwood*, 30 Beav. 49; *Sweetapple v. Harlock*, 11 Ch. D. 745, stated *ante*, p. 512, is an example of this rule. See also *Childers v. Eardley*, 28 Beav. 648, stated *ante*, p. 186.

Infant Wife (b).

If the wife be an infant, she cannot bind herself by her covenant to settle, but the husband will not be allowed to do or concur in any act to enable her to dispose of the property in a manner inconsistent with her covenant; *Rimm v. Insall*, 7 Ha. 193. See *Milner v. Harewood*, 18 Ves. at p. 279; and *Ex parte Blake*, 16 Beav. 409, where the covenant was that the property should be conveyed by the husband and wife to the trustees: but the report does not state by whom the covenant was made. It appears, however, that the wife was an infant, and therefore, even if she purported to covenant, the covenant was not binding on her. (The observation of the M. R., at p. 471, that "the covenant of the wife is not binding on her," seems to indicate that she was a covenanting party.)

Where the husband alone covenanted, and the wife was an infant, it was held that property to which she became entitled during the coverture and after 1882, so that it was her separate property by virtue of the Married Women's Property Act, 1882, was not bound; *Re Queade's Trusts*, W. N. 1884, p. 225.

Where the wife was an infant, and the settlement recited that it had been agreed that the property, both real and personal, should be settled, and that the husband should enter into the covenant therein mentioned, and the husband covenanted that, "in case the wife would voluntarily consent thereto, but not otherwise," he and she

(b) The wife may during the coverture elect to confirm her covenant; Election by *Smith v. Lucas*, 18 Ch. D. 531; *Wilder v. Pigott*, 22 Ch. D. 263; *King v. Lucas*, 23 Ch. D. 712; and as to real estate without deed acknowledged; *Barrow v. Barrow*, 4 K. & J. 409; and that even if she has, as a consequence of election, to give up a life interest subject to a restraint on anticipation; *Re Vardon's Trusts*, 23 Ch. D. 121, following *Willoughby v. Middleton*, 2 J. & H. 344, in preference to *Smith v. Lucas*, 18 Ch. D. 531, and *Re Wheatley*, 27 Ch. D. 606.

But volunteers, *c. g.*, next of kin, cannot enforce the covenant against Volunteers the legal personal representative of an infant wife; *Re D'Angibau*, cannot enforce *Andrews v. Andrews*, 15 Ch. D. 228. , covenant.

would settle, it was held that the consent applied to the real estate only, and that the personalty must be settled, even if the wife refused to consent; *Re Daniel's Trust*, 18 Beav. 309.

Covenants to Settle Husband's Property.

Covenant
to settle
husband's
property.

There is but little authority as to the meaning of covenants to settle the husband's property. See *Prebble v. Boghurst*, 1 Swan. 309, *ante*, p. 511; *Randall v. Willis*, 5 Ves. 262; *Needham v. Smith*, 4 Russ. 318; *Tayleur v. Dickinson*, 1 Russ. 521; *Churchill v. Denny*, L. R. 20 Eq. 534, *ante*, p. 517. See also the cases cited under Rule 186, p. 525; 3 Dav. Conv. 219; Peachey on Settlements, 544.

To leave by
will.

As to covenants to leave property by will, see *Jones v. Martin*, 3 Ans. 882; S. C., 5 Ves. 266 (n.); *Fortescue v. Hannah*, 19 Ves. 67; *Willis v. Black*, 1 Sim. & St. 525; S. C., 4 Russ. 170; *Needham v. Smith*, 4 Russ. 318; *Cochran v. Graham*, 19 Ves. 66; *Graham v. Wickham*, 1 De G. J. & S. 474; *Patch v. Shore*, 2 Dr. & Sm. 589; *M'Carogher v. Wheldon*, L. R. 3 Eq. 236; *Re Brookham*, L. R. 5 Ch. 182; *Jervis v. Wolferstan*, L. R. 18 Eq. 18.

Miscellaneous Cases.

Where the husband covenanted to settle the share of his wife and himself "in her right" under her grandfather's will, *held*, that this meant property which the wife, but for the marriage, would have taken, and therefore an interest given to the husband himself was not bound; *Ibbetson v. Grote*, 25 Beav. 17.

It has been held that property given to the husband and wife as joint tenants in fee, was not within the covenant; *Edye v. Addison*, 1 H. & M. 781; S. C., 12 W. R. 97.

Covenant to settle "any real or personal estate and effects" on trusts for sale and investment; *held*, that no exception could be implied of any specific chattels; *Willoughby v. Middleton*, 2 J. & H. 344.

A covenant to settle "fortune or substance" extends to real estate; *Scully v. Scully*, Sugd. Law of Prop. 104.

An estate tail to which the wife became entitled in possession, held not to be bound by the covenant; *Hilbers v. Parkinson*, 25 Ch. D. 200.

Where the covenant was for the settlement of property coming to or vesting in the *wife* or the *husband* in her right during the coverture, it was held that a legacy given to the *wife* by her father, which was saved by her leaving issue from lapse on her death in his lifetime, was not bound by the covenant; *Pearce v. Graham*, 11 W. R. 415; S. C., 32 L. J. Ch. 359.

As to the operation by way of covenant of an attempted assignment of property not belonging to the assignor, see *ante*, Chap. XXVII., COVENANTS, p. 408.

CHAPTER XXXII.

MARRIAGE ARTICLES.

Trusts executed : executory : Direction to convey—"to settle as counsel shall advise : " In executory trusts technical language may be disregarded : In marriage articles the children of first taker to take by purchase if possible ; but the contrary may appear by the context : Where one parent alone could not defeat settlement : Where articles settle part strictly : Where limitation to heirs of the body follows limitations to sons as purchasers : Discrepancy between articles and settlement : Construction of executory trusts in voluntary deed or will—"Heirs male of the body : " " Issue male : " " Heirs female of the body : " " Heirs of the body : " " Issue : " Order of estates tail of children : " Issue, whether son or daughter : " " Child or children of marriage : " " Nearest relative in male line : " Miscellaneous : Life estate : Covenant to settle chattels by reference to limitations of realty : Articles to settle personalty : Interests of wife—of children : Ultimate trusts : " Issue," meaning children : General power of appointment cut down to power to appoint among children : What powers should be inserted in the settlement : aliens.

Executed trust.

Definition.—A trust is called executed when the statement of the trusts is complete and final.

Executory trust.

Definition.—A trust is called executory, when the statement of the trusts is incomplete, and

requires to be further expressed by a subsequent instrument; *Glenorchy v. Bosville*, Ca. t. Talb. 4, S. C., 1 Wh. & Tud. 1.

A mere direction to convey does not render the trust executory; *Doncaster v. Doncaster*, 3 K. & J. 26, *per* Wood, V.-C. at p. 35; *Franks v. Price*, 3 Beav. 182; for "all trusts are in a sense executory, because a trust cannot be executed except by conveyance, and therefore there is always something to be done. But . . . a Court of Equity considers an executory trust, as distinguished from a trust executing itself, and distinguishes the two in this manner:—Has the testator been what is called his own conveyancer? Has he left it to the Court to make out from general expressions what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates?" *per* Ld. St. Leonards, *Egerton v. Earl Brownlow*, 4 H. L. C. 210.

Distinguished
from executed
trust.

"Wherever the assistance of trustees, which is ultimately the assistance of the Court, is necessary to complete a limitation, in that case, the limitation of the will not being complete, that is sufficient evidence of the testator's intention that the Court should model the limitations. But where the trusts and limitations are already expressly declared, the Court has no authority to interfere, and make them different from what they would be at law;" *per* Sir R. Henley, L. K., *Austen v. Taylor*, 1 Ed. at p. 368; S. C., Amb. 376; cited *per* Plunket, C., *Herbert v. Blunden*, 1 Dr. & Wal. 91.

"In construing the words creating an executory trust, a Court of Equity exercises a large authority in subordinating the language to the intent;" *per* Ld. Westbury, *Sackville-West v. Holmesdale*, L. R. 4 H. L. at p. 565.

Rule 189.—A direction to settle 'as counsel shall advise,' affords a strong indication that the trusts are executory; *White v. Carter*, 2 Amb. 670; S. C., 2 Ed. 366.

Direction to
settle as
counsel shall
advise.

“ The words ‘ as counsel shall advise ’ must be read as qualifying the dispositions ; you would not go to counsel, and ask his advice merely as to the proper form of conveyance to be used, whether feoffment, bargain and sale, or lease and release, but you would also inquire how the limitations should be framed ; ” *per* Sugden, C., *Rochfort v. Fitzmaurice*, 2 Dr. & War. at p. 21.

Technical
language may
be disregarded.

Rule 190.—In the case of executory trusts, the technical language of limitations may be disregarded if it appear on the face of the instrument directing the settlement to be made, that such technical language cannot be inserted in the settlement without defeating the intention of the parties.

“ In matters executory, as in case of articles or a will directing a conveyance, where the words of the articles or will are improper or informal, this Court will not direct a conveyance according to such improper or informal expressions in the articles or will, but will order the conveyance or settlement to be made in a proper and legal manner, so as may best answer the intent of the parties ; ” *per* Lord Cowper, C., *Stamford v. Hobart*, 3 Br. P. C. Edit. Toml. at p. 33.

“ Articles are considered [in equity] as minutes only, and the settlement may afterwards explain more at large the meaning of the parties ; ” *per* Lord Hardwicke, C., *Blandford v. Marlborough*, 2 Atk. 545.

“ If it is clearly to be ascertained from anything in the will that the testator did not mean to use the expressions which he has employed in their strict, proper, technical sense, the Court, in decreeing such settlement as he has directed, will depart from his words, in order to execute his intention ; but the Court must necessarily follow his words, unless he has himself shown that he did not mean to use them in their proper sense ; and have never said that merely because the direction was for an entail, they would execute that by decreeing a strict settlement ; ” *per* Lord Eldon, C., *Blackburn v. Stables*, 2 V. & B. 367.

"I must suppose that those who use technical words intend to use them in a technical sense, unless something to the contrary appears. In this case, then, I must look for the intention upon the face of the instrument itself. If I come to the conclusion that it is an executory trust, there is no difference whatsoever between executory trusts, whether created by marriage articles, by a voluntary settlement, or by a will. There is, indeed, in the latter case, much greater difficulty in arriving at the conclusion that the trust is executory; for, in the first case, the nature of the instrument establishes the fact; in the others, it must be collected from the nature of the dispositions in the instruments. I admit that, though this trust is so far executory as to leave something to be done, yet the party may afterwards have become, as it is styled, 'his own conveyancer,' that is, he may have defined so clearly his intention as to the limitations of the settlement as to leave no room for ambiguity or doubt; if he had done so, I must have given to the words he has used their legal operation;" *per* Sugden, C., *Rochfort v. Fitzmaurice*, 2 Dr. & War. 20.

Rule 191. -In the case of marriage articles, the nature and purpose of the instrument show that it could not be intended to allow the settlement to be defeated by the first taker; and, accordingly, words giving him an estate for life, with remainder to his heirs, or to the heirs, or issue, of his body, will be construed so as to give him an estate for life only, with remainders over in strict settlement. See, to this effect, *per* Lord Eldon, C., in *Jervoise v. Duke of Northumberland*, 1 J. & W. 574; *per* Grant, M. R., *Blackburn v. Stables*, 2 V. & B. 370; *per* Lord St. Leonards, *Rochfort v. Fitzmaurice*, 2 Dr. & War. 20; *per* Lord Cairns, C., *Sackville-West v. Holmesdale*, L. R. 4 H. L. 572. See also *Davies v. Davies*,
Nature and purpose point to strict settlement.

4 Beav. 54; Fearn, C. R. 90; and notes to *Glenorchy v. Bosville* in 1 Wh. & Tud. at p. 20 (5th ed.).

“When the object is to make a provision by the settlement of an estate for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose, and to appropriate the estate to himself. If, therefore, the agreement is to limit an estate for life, with remainder to the heirs of the body, the Court decrees a strict settlement in conformity to the presumable intention;” *per* Grant, M. R., *Blackburn v. Stables*, 2 V. & B. 370; see also *Trevor v. Trevor*, 1 Eq. Ca. Ab. 387; S. C., 1 P. Wms. 622; 5 Bro. P. C. (Ed. Tom.) 122; *Streatfield v. Streatfield*, Ca. t. Talb. 176; S. C., 1 Wh. & Tud.; *Jones v. Langhton*, 1 Eq. Ca. Ab. 392; *Deerhurst v. St. Albans*, 5 Madd. 260; *Darries v. Davies*, 4 Beav. 54.

No express
estate for life
to parent.

The rule is applied even in cases where no express limitation for life is made to the parent in the articles, so that the rule in *Shelley's Case* does not apply, and a settlement made strictly in conformity with the articles would not be liable to be defeated by him; *Griffith v. Buckle*, 2 Vern. 13; *Cusack v. Cusack*, 5 Bro. P. C. (Ed. Tom.) 116; *Grier v. Grier*, L. R. 5 H. L. 688.

Rule applied
in favour of
daughters.

The rule is applied in favour of daughters; *Nandick v. Wilkes*, 1 Eq. Ca. Ab. 393; S. C., sub nom. *Nandicke v. Wilkes*, Gilb. Eq. Rep. 114; *Dod v. Dod*, 1 Amb. 274; *West v. Erissey*, 2 P. Wms. 349; S. C., 1 Bro. P. C. (Ed. Tom.) 225; *Hart v. Middlehurst*, 3 Atk. 371; *Phillips v. James*, 2 Dr. & Sm. 404; S. C., 3 De G. J. & S. 72; unless they are provided for by portions; *Powell v. Price*, 2 P. Wms. 535; S. C., 2 Eq. Ca. Ab. 40; or unless the articles provide for issue male only; *Maguire v. Scully*, 2 Hog. 113; S. C., Beat. at p. 380.

Gavelkind;

It makes no difference in the construction of the articles that the land is gavelkind; *Roberts v. Dixwell*, 1 Atk. 606; or Borough-English; *Starkey v. Starkey*, 8 Bač. Ab. 302 (7th ed.).

or Borough-
English.

The context may show that the rule is not to be applied :

In *Collins v. Plummer*, 1 P. Wms. 104, where the articles contained a covenant that the husband should not suffer a recovery, the rule was not applied, since it was clear that the parties intended to rely on his covenant.

The rule is subject to three exceptions :—

First Exception.—Where, in the case of articles executed prior to the Fines and Recoveries Act, the property of the husband was settled on the wife and the heirs of her body: for this created an estate tail, *ex provisione viri*, which could not be barred by either husband or wife alone; see *Greneley's Case*, 8 Rep. 71 b; *Honor v. Honor*, 1 P. Wms. 123; *Highway v. Banner*, 1 Bro. C. C. 584; *Whateley v. Kemp*, cited 2 Ves. Sen. 358; per Lord Hardwicke, *Green v. Elkins*, 2 Atk. 471; per Lord Hatherley, *Sackville-West v. Holmesdale*, L. R. 4 H. L. C. 554. But this exception does not exist when the articles are made after 1833; per Sugden, C., *Rochford v. Fitzmaurice*, 2 Dr. & War. at p. 19.

Where one parent alone could not defeat settlement.

Second Exception.—If part of the land be by the articles themselves settled in strict settlement, and other part be limited to the first taker, and the heirs of his body; for this shows that the parties knew how to limit the estate in strict settlement when they wished to do so; *Chambers v. Chambers*, Fitz.-G. 127; S. C., Mos. 333; 2 Eq. Ca. Ab. 35, pl. 4; *Howel v. Howel*, 2 Ves. Sen. 358.

Where articles settle part strictly.

Third Exception.—Where the limitation to the heirs of the body is in remainder after limitations to sons the limitations in strict settlement will not be extended to daughters; *Powell v. Price*, 2 P. Wms. 535, where the construction was aided by the fact that portions were provided for the daughters.

Limitation to heirs of body after limitations to sons as purchasers.

Rule 192.—If the marriage articles and the Articles and

settlement
both before
marriage.

settlement are both made before the marriage, the settlement will be considered as superseding the articles, unless it be expressly stated to have been made in pursuance of them, or unless it can be otherwise shown that it was intended to carry them out, and that the difference has arisen by mistake.

Articles before
and settle-
ment after
marriage.

Rule 193.—If the articles are made before and the settlement after the marriage, the articles will control the settlement.

“Where articles are entered into before marriage, and a settlement is made after marriage different from those articles (as if by articles the estate was to be in strict settlement, and by the settlement the husband is made tenant in tail whereby he hath it in his power to bar the issue), this Court will set up the articles against the settlement; but where both articles and settlement are previous to the marriage, at a time when all parties are at liberty, the settlement differing from the articles will be taken as a new agreement between them, and shall control the articles. And although in the case of *West v. Erissey*, 2 P. Wms. 349; S. C., 1 Bro. P. C. (Ed. Tom.) 225, the articles were made to control the settlement made before marriage, yet that resolution no way contradicts the general rule: for in that case the settlement was expressly mentioned to be made in pursuance and performance of the marriage articles, whereby the intent appeared to be still the same as it was at the making of the articles;” *per* Talbot, C., *Legg v. Goldwire*, Ca. t. Talb. 20; S. C., 1 Wh. & Tud., 5th ed. 17. In *West v. Erissey*, 2 P. Wms. 349; S. C., 1 Bro. P. C. (Ed. Tom.) 225; *Honor v. Honor*, 1 P. Wms. 123; and *Roberts v. Kingsly*, 1 Ves. Sen. 238, where, although the settlement was made before the marriage it was expressly stated to be made in pursuance of the articles, and in *Randall v. Willis*, 5 Ves. 262, where the settlement was made after

the marriage, it was held that the settlement must be controlled by the articles.

In *Bold v. Hutchinson*, 5 De G. M. & G. 558, Lord Cranworth, C., says (at p. 568):—"The doctrine now is, that when a settlement purports to be in pursuance of articles entered into before marriage, and there is any variance, there no evidence is necessary in order to have the settlement corrected; and although the settlement contains no reference to the articles, yet, if it can be shown that the settlement was intended to be in conformity with the articles, yet if there is clear and satisfactory evidence showing that the discrepancy had arisen from a mistake, the Court will reform the settlement and make it conformable to the real intention of the parties."

As to a letter by a lady's father stating what her fortune would be, followed by articles for the settlement of part only of the property mentioned in the letter, see *Re Badcock*, 17 Ch. D. 361. Letter followed by articles.

Exception.—Where, under a settlement made after marriage, an adult takes a smaller interest than he would have taken under the articles, the presumption is that the variance was made purposely, unless the settlement is expressly made in pursuance of the articles: *Partyn v. Roberts*, 1 Amb. 315.

Rule 194.—In the case of a voluntary deed or of a will containing executory trusts, the intention that the exact words mentioned in the instrument as proper for the complete settlement are not to be used, must be plainly manifested, and will not be assumed merely because the instrument is executory; *per* Lord Hatherley, C., *Sackville-West v. Holmesdale*, L. R. 4 H. L. 554; see the discussion in *Deerhurst v. St. Albans*, 5 Mad. at p. 255. Voluntary deeds and wills.

"If a will directs a limitation for life, with remainder to the heirs of the body, the Court has no such ground," (*i.e.* of purpose of the instrument) "for decreeing a

strict settlement. A testator gives arbitrarily what estate he thinks fit. There is no presumption that he means one quantity of interest rather than another, an estate for life rather than in tail or fee. The subject being mere bounty, the intended extent of that bounty can be known only from the words in which it is given; but if it is clearly to be ascertained from anything in the will that the testator did not mean to use the expressions which he has employed in their proper technical sense, the Court, in decreeing such settlement as he has directed, will depart from his words in order to execute his intention; but the Court must necessarily follow his words, unless he has himself shown that he did not mean to use them in their proper sense;" *per* Grant, M. R., *Blackburn v. Stables*, 2 V. & B. at p. 370.

"Voluntary settlements and wills generally stand on the same footing. The settlement cannot stand on a footing inferior to that of a will: for the very act of making the settlement *inter vivos* rather leads to the inference that a strict settlement was intended; in both, however, the rule of law is clear; the intention must be collected from the four corners of the instrument, and the nature of the instrument does not enable the Court to say that a strict settlement was intended. In marriage settlements the nature of the instrument leads to that conclusion; but in the case of a voluntary settlement, or even a settlement for valuable consideration not upon marriage, there is nothing irrational in a limitation to a son of the settlor in tail; it may be improvident, but it is difficult to say that it could not have been intended. I must suppose that those who use technical words intend to use them in a technical sense, unless something to the contrary appears;" *per* Sugden, C., *Rochfort v. Fitzmaurice*, 2 Dr. & War. at p. 20. *

Accordingly in the cases of *Seale v. Seale*, 1 P. Wms. 290, *Garth v. Baldwin*, 2 Ves. Sen. 646, and *Blackburn v. Stables*, 2 V. & B. 367, the settlement was carried out by giving an estate tail to the first taker.

. On the other hand, a strict settlement was decreed in

the cases of *Leonard v. Sussex*, 2 Vern. 526, where the words were "taking special care in such settlement that it never be in the power of either of the said A. and B. to dock the entail;" *White v. Carter*, Amb. 670, where the settlement was to be made "as counsel should advise on A. and the heirs male of his body, to take in succession and priority of birth;" in *Papillon v. Voice*, 2 P. Wms. 471, where money was given to be laid out in the purchase of land to be settled on B. for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder to the heirs of the body of B., with remainders over, with power to B. to "make a jointure;" in *Bastard v. Proby*, 2 Cox, 6; where the settlement was to be made "as counsel should advise, in trust for A. for life, and after her death, then on the heirs of her body lawfully issuing; but in case A. should die without leaving issue, &c.;" in *Shelton v. Watson*, 16 Sim. 543, where there was a direction to purchase an estate "to be made hereditary and settled on my here constituted heir, and to descend to his heirs, or, dying without issue, as I shall now provide for. I hereby constitute A. my heir and successor; and the said estate, when purchased, is to be settled on him, his heirs and successors in the direct male line lawfully begotten and born in wedlock. In case the said A. die without issue," remainders over; "my object, intent, desire, and command, being that the said estate shall never pass out of my family, and that no person shall hold it under any other name than the name of B.;" in *Thompson v. Fisher*, L. R. 10 Eq. 207, where the settlement was to be made "to the use of A. and the heirs of his body lawfully issuing, but in such manner and form nevertheless, and subject to such restrictions and limitations as that if the said A. shall happen to die without leaving lawful issue" the property shall descend to testator's daughter; in *Lord Glenorchy v. Bosville*, Cas. t. Talb. 3; S. C., 1 Wh. & Tud. 1, where the settlement was to be made to A. for life, without impeachment of

waste, voluntary waste in houses alone excepted, remainder to her husband for life, remainder to the issue of her body, with remainders over.

Of the Form of the Settlement.

We have now to consider the form that a settlement made in pursuance of articles ought to take.

Land to be settled or "heirs male of the body," or "issue male."

Rule 195.—When the subject-matter of the articles is land, and provision is made for the "heirs male of the body" or "issue male," the sons take successively in tail male.

See *Cusack v. Cusack*, 5 Bro. P. C. Ed. Tom. 116; *Brennan v. Fitzmaurice*, 2 Ir. Eq. R. 113, where the words are "heirs male of the body;" *Trevor v. Trevor*, 5 Bro. P. C. Ed. Tom. 122; S. C., 1 Ab. Eq. 387; S. C., 1 P. W. 622; where the words are "heirs male of the body and the heirs male of such heirs male issuing;" see also *Maguire v. Scully*, 2 Hog. 113; S. C., Bent. 370.

"Heirs female of the body."

So "heirs female of the body" means daughters; *West v. Trissey*, 2 P. Wms. 349; S. C., 1 Bro. P. C. Ed. Tom. 225.

First male issue.

"First male issue lawfully begotten which should attain the age of twenty-one years" means the first son who attains twenty-one; *Hampson v. Brandwood*, 1 Madd. 381.

Issue male.

Where the articles reserved a power to the wife to appoint to "her issue male by the intended husband." *Held*, that a son of her daughter by him was not an object of the power; *Lambert v. Peyton*, 8 H. L. C. 1. See *ante*, Rule 90, p. 254.

Land to be settled on "heirs of the body," or "issue."

Rule 196.—Where the subject-matter of the articles is land, and provision is made for "heirs of the body," or "issue," the sons take successively

in tail, with remainder to the daughters as tenants in common in tail, with cross remainders between them.

The case of *Nandiek v. Wilkes*, 1 Eq. Ab. 393, pl. 5; S. C., Gilb. Eq. Rep. 114, shows that “heirs of the body,” and the cases of *Dod v. Dod*, Amb. 274; *Hart v. Middlehurst*, 3 Atk. 371; *Treror v. Treror*, 13 Sim. 108; S. C., 1 H. L. C. 239; *Prebble v. Boghurst*, 1 Swanst. 309 (see 332); *Phillips v. James*, 2 Dr. & Sm. 404, 3 De G. Jo. & S. 72, show that “issue” means both sons and daughters. In all these cases, except *Prebble v. Boghurst*, where the point did not require decision, it was held that the sons took successive estates in tail with remainder to the daughters in tail; and, after some conflict of authorities, it appears to be the better opinion that the latter take as tenants in common in tail with cross remainders.

The reason for the rule is stated in *Grier v. Grier*, L. R. 5 H. L. 688 (see p. 706), by Lord Cairns, who says:—“In executing this provision in the marriage articles, the Court of Chancery would have made, under the term ‘issue,’ a provision in some way or other for the whole of the children of the marriage both male and female . . . by raising and creating estates tail; because otherwise the first line only would have been provided for, whereas the term ‘issue,’ as we know, includes descendants *ad infinitum*. . . . The only question which remains . . . is this:—Would the interest . . . have been created by giving estates tail to the children concurrently, or would it have been created by giving estates tail to them successively? In either case you provide for the children of the marriage, or the issue of the marriage, *ad infinitum*. . . . I entirely agree with the observation made in the Court below, that great weight is to be attributed to the term which is used, namely, ‘settle.’ As I understand that word, it must ^{Settle.} mean this, that the husband agrees to settle—that is to say, to make a settlement of—the property upon the issue

of the marriage. And that being the meaning of the word 'settled,' I hold it to be an established rule, . . . that when, after a life estate is either given or reserved to the father upon the occasion of a marriage, there is a contract to make a settlement of real estate upon the issue of the marriage, that must be effected by giving successive estates tail to the children of the marriage. . . . The reason . . . is this—that the rule which the Court of Chancery has laid down for itself is, in limiting estates by way of purchase to the issue of a marriage, to go as near as possible to that line of devolution of the property which would have taken place if the father in the first instance had remained the proprietor of an estate tail. In that case the estate would have gone first to the sons in succession, and then to the daughters as heirs of tail together. And while the Court of Chancery secures to the children estates by way of purchase, which cannot be defeated by the parent, it preserves at the same time the line of devolution, *cy-près*, as near as possible to that line which would have been followed if the father had taken first an estate tail."

"Issue, their heirs and assigns for ever."

The same construction was placed on "issue, their heirs and assigns for ever" by Kindersley, V.-C. in *Phillips v. James*, 2 Dr. & Sm. 404, on the ground that if the words "their heirs and assigns" had been omitted there would have been enough to give estates tail to the children as purchasers, and that the addition of the words "their heirs and assigns for ever" could make no difference. This decision was affirmed on appeal, 3 De G. Jo. & S. 72, contrary to the opinion of Knight-Bruce, L. J.

Form of gift over.

In *Dillon v. Blake*, 16 Ir. Ch. R. 24, by a post-nuptial agreement for valuable consideration, land was to be settled upon B., eldest son of A., "and his issue," with remainder, in the event of B. dying in the lifetime of A. without lawful issue, "to each of the said sons of A. in succession according to their seniority," with an ultimate remainder to right heirs of A. B. survived A. and had issue. *Held*, that B. was entitled to an estate tail in possession

with remainder to himself in fee, the decision turning on the form of the gift over on B.'s death.

Exception.—In *Thompson v. Simpson*, 1 Dru. & War. 459, where there was a covenant to settle land on trust “for the issue of H. by N.,” in such shares as H. should appoint, and in default as N., in case she survived H., should appoint, it was held that in default of appointment the children took as tenants in common in fee simple.

Observation.—The words “heirs of the body” are flexible, and may be inserted after a limitation to “heirs male of the body,” not for the purpose of providing for the daughters of the settlor, but for letting in the daughters of his sons, by giving estates in tail general to the sons.

“Heirs of the body,” following limitation to “heirs male of the body.”

This construction will be aided if the articles make provision for the settlor's daughters by way of portions. It prevailed in *Powell v. Price*, 2 P. Wms. 535, where the provisions for the children were to the use of the sons of the marriage “in tail male successively, remainder to the heirs male of the body” of the settlor by any wife, remainder to “the heirs of his body” by the intended wife, and for want of such issue remainder to the right heirs of the settlor; it was provided that if the settlor should die without issue male by his intended wife, and there should be daughters, portions should be raised for such daughters.” See the remarks on this case in *Maguire v. Scully*, 2 Hogg., at p. 138; S. C., Beatt. 370.

The words “issue, whether son or daughter, if begotten on the body of, &c.,” were held to make them take as tenants in common (apparently in fee), with cross limitations over on the death of any child under twenty-one, and without issue; *Taggart v. Taggart*, 1 Sch. & Lef. 84.

“Issue, whether son or daughter.”

As to the construction of “child or children” of the

children of the marriage." said intended marriage, see *Rossiter v. Rossiter*, 9 Ir. Jur. N. S. 373, reversing 14 Ir. Ch. R. 247.

"Nearest relative in male line." "Nearest relative in the male line;" *Woolmore v. Burrows*, 1 Sim. at p. 529.

Miscellaneous.

Agreement by husband in marriage articles to convey lands in trust for himself for life, and, if the intended wife survived him, to her use and that of their child or children; if no child, to the use of the intended wife and her heirs; *held*, that the settlement ought to give the intended wife a life estate, with remainder to the children of the marriage; *Rossiter v. Rossiter*, 14 Ir. Ch. R. 247; reversed 9 Ir. Jur. N. S. 373.

Trustees to preserve.

Formerly, where the Court decreed a strict settlement, it inserted proper limitations to trustees to preserve contingent remainders; *Stamford v. Hobart*, 3 Bro. P. C. Ed. Tom. 31; *Baskerville v. Baskerville*, 2 Atk. 279; *Harrison v. Naylor*, 2 Cox, Rep. 247; *S. C.*, 3 Bro. C. C. 108; *Woolmore v. Burrows*, 1 Sim. 512, and this might still be necessary in some cases.



Life Estates.

Impeachment for waste.

The question whether life estates limited in pursuance of an executory trust are to be made impeachable for waste is discussed in *Leonard v. Sussex*, 2 Vern. 526; *White v. Briggs*, 15 Sim. 17, 2 Ph. 583; *Davenport v. Davenport*, 1 H. & M. 775; *Stanley v. Coulthurst*, L. R. 10 Eq. 259; and *West v. Holmesdale*, L. R. 4 H. L. 543. The principle appears to be that if the settlor or testator has expressly directed a life estate to be given, it must be made liable to impeachment for waste; but, on the other hand, if the words used would *per se* give the first taker an estate of inheritance, the life estate to which it is cut down is not to be made impeachable for waste; see 3 Dav. Conv. p. 280, note (c).

Life estate without power of anticipation.

In *Clive v. Clive*, 20 W. R. 477, where, by the articles, a life estate was given to a woman without power of anticipation, it was held that it should not be *sans* waste,

as a life estate *sans* waste would be inconsistent with a life estate without power of anticipation.

Covenant to settle chattels by reference to limitations of realty.

Rule 197.—If freeholds be settled in strict settlement, and there be a covenant to settle chattels on like trusts, a proviso must be inserted that they shall not vest absolutely in any tenant in tail by purchase who dies under the age of twenty-one without leaving issue.

Covenant to settle chattels by reference to strict settlement of realty.

Jekyll, M.R., considered that the proper plan was to insert a gift over on the death of the tenant in tail under twenty-one; *Stanley v. Leigh*, 2 P. Wms. 690. Lord Hardwicke, C., suggested that it should be on his death without issue before twenty-one; *Gower v. Grosvenor*, Barn. Ch. Rep. 63; *S.C.*, 5 Mad. 348; and Lord Loughborough, C., made an express decision to this effect in *Newcastle v. Lincoln*, 3 Ves. 387, but before the appeal to the House of Lords (12 Ves. 218), the first tenant in tail had attained the age of twenty-one, and therefore the only point decided was that he had become absolutely entitled. A collection of forms used by eminent conveyancers will be found in *West v. Holmesdale*, L. R. 5 H. L. C. 93, note, from which it appears that the form making a gift over on death under twenty-one without issue had been adopted by the Court.

Personalty.

It is difficult to lay down any rule for the construction of articles for the settlement of personalty. The cases of settlements directed by wills throw but little light on the construction of marriage articles, because, in the former case, there is nothing to guide us except the words of the will; while in the latter case we must remember that the parties must probably have intended to provide for the wife and issue of the marriage.

Articles and wills distinguished.

Restraint on
anticipation.

If the articles expressly provide for the settlement of the wife's property on her for life "for her separate use," the Court will not add a restraint on anticipation, but will leave the parties to their remedy by a suit to rectify; *Symonds v. Wilkes*, 13 W. R. 1026, reversing *S.C.*, 12 W. R. 541; but if separate use is left to implication the restraint on anticipation will be inserted; *Stanley v. Jackman*, 23 Beav. 450; possibly the real distinction between these cases is that in *Symonds v. Wilkes* the articles were not strictly speaking executory; and see *Re Dunnill's Trusts*, Ir. R. 6 Eq. 322 (a will case).

Children take
as tenants in
common;

It appears that the Court inclines to make children take as tenants in common rather than as joint tenants; *Mayn v. Mayn*, L. R. 5 Eq. 150; *Liddard v. Liddard*, 28 Beav. 266; but see *Re Bellasis' Trust*, L. R. 12 Eq. 218.

at twenty-
one, or in case
of daughter's
marriage.

Where marriage articles provided for the wife's property being vested in trustees, "the trusts of the income being for the benefit of the said husband and wife during their lives, and the trusts of the capital being for and amongst the children according to the appointment of the said husband and wife, or the survivor of them; and in default of appointment, for the children equally; and in the event of there being no children, and of the said husband being the survivor, the trust property to be at his absolute disposal;" held, that the articles ought to be carried into effect by giving the wife the first life interest to her separate use, and by making the shares of sons contingent on their attaining twenty-one, and of daughters on their attaining twenty-one or marrying, or by inserting clauses of survivorship and accruer, on the deaths of sons under twenty-one, and of daughters under that age unmarried; *Cogan v. Duffield*, 2 Ch. D. 44.

Hotchpot.

A hotchpot clause will not be inserted without an express direction to that effect; *Lees v. Lees*, Ir. R. 5 Eq. 549.

Trusts in
default of
children.

Where a fund of personalty was given by deed, apparently voluntary, by a man to his daughter to be settled "upon her and her issue," so that "the same

might not be liable or subject to the debts, control, or engagements of any husband" whom she might marry during her lifetime, *held*, that the settlement ought to give the daughter a power of appointment by will in default of issue; *Stanley v. Jackman*, 23 Beav. 450; but see *Re Bellasis' Trust*, L. R. 12 Eq. 218.

The case of *Byam v. Byam*, 19 Beav. 58, is so special in the facts that it is not worth stating in this place.

In *Kentish v. Newman*, 1 P. Wms. 234, the covenant was to invest a sum of money in the purchase of an annuity to be settled on the husband and wife for their lives, remainder to the heirs of their bodies, remainder to the husband in fee, and until the settlement should be made the money was to be applied for the separate use of the wife; if no settlement were made during the joint lives of the husband and wife, the money was to be to the sole use of the wife, if living, but if she died before her husband, to her brother and sister. It was held that the brother and sister of the wife took only if she predeceased her husband without leaving issue. Ultimate trusts.

A father, on his daughter's marriage, agreed by a memorandum in writing "to charge his property with £1000 as her fortune, to be vested in trustees for her benefit, she to receive the interest at 5 per cent. on her sole and separate receipt during the term of her natural life; but if she has a family, she is to have the power of disposing of it amongst her children in such shares and proportions as she and her husband may think proper; the father to have the power to lodge the £1000, with her consent and that of her trustee, in any security they might agree upon." No settlement was ever executed, and the wife died without issue. *Held*, that the husband, as his wife's administrator, was entitled to the £1000, and to specific performance against the father, notwithstanding the contention of the father that there was a resulting trust for him; *Dennehy v. Delany*, Ir. R. 10 Eq. 377. See *ante*, p. 294.

Rule 198.—Whether the subject of the articles "Issue,"

meaning
"children."

be realty or personalty, the word "issue" may be explained to mean "children." See *ante*, Rule 128, p. 320.

Examples.—By articles made for value after marriage it was agreed that leases for lives and years should be conveyed to trustees, in trust for A. and B. successively for life, and after the death of B. for the "issue" of B. and C. (his wife) as B. should appoint, and in default for "such children" share and share alike, and in default of "such issue," for the heirs, executors, and administrators of the said B. during the said leases; and that a sum of money, or the lands agreed to be purchased therewith should go (after the death of B. and C.) to "the issue" of the said B. and C. as B. and C. or the survivor should appoint, and in default should be equally divided among "such children" share and share alike, and if there should be no "issue" of the said marriage, or if all "such issue" should die under twenty-one, over; *held*, that "issue" must be read "children;" *Campbell v. Sandys*, 1 Sch. & Lef. 281.

By marriage articles a reversionary interest in personalty was agreed to be settled on the husband and wife successively for life, and after the death of the survivor on the "issue of the marriage" living at the death of the survivor of the husband and wife as the husband should appoint, and in default of appointment then on "such issue" in equal shares if more than one, and if but one, then the whole to go to "such only child;" and if there should be no "issue of the marriage" living at the death of the survivor of the husband and wife, then as the husband should appoint; *held*, that "issue" meant "children;" *Swift v. Swift*, 8 Sim. 168.

Articles on marriage to settle freeholds, after the death of the husband, "to go to and be vested in the issue of" the husband and wife, "and that such issue should also be entitled to a further sum of £1,000" (to be charged on other property) "in such shares and proportions as" the husband should appoint; in default, as the wife

should appoint; and in default, "in equal shares if there should be more than one of such issue born in the said (husband's) lifetime, or in a reasonable time after his death; *held*, that "issue" meant "children;" *Thompson v. Simpson*, 1 Dr. & War. 459.

By marriage articles it was agreed that the trustees of a money fund, after the decease of the husband, should pay the residue of the interest and also the principal sum (subject to an annuity by way of jointure for the wife) to the "issue of the said intended marriage," as the husband should appoint; and in default of appointment, to "all the issue" in equal shares "to such of the said issue" as should be sons, at twenty-one, and to such of them as should be daughters, at twenty-one or marriage; and that there should be a power of advancement for "the said issue of the marriage" to the extent of one-half of the share of "such child respectively;" and if there should be "no issue of the intended marriage, or all such issue should die in the lifetime of" the husband, then the whole trust fund should (subject to the jointure) vest and be assigned, and go to the husband, his heirs, executors, &c., absolutely, for his and their sole use and benefit. And it was further agreed that a regular deed of settlement should be executed, which should contain the several clauses and covenants in such cases usual and proper; *held*, that the word "issue" was to be read "children;" *Roche v. Roche*, 2 Jo. & Lat. 561.

In *Bell v. Bell*, 13 Ir. Ch. R. 517, a power of appointment in favour of issue, was on the context explained to mean a power to appoint life estates only to the children alive at the date of the deed, with remainders to their issue in strict settlement. Power to appoint to "issue."

By marriage articles it was agreed that personalty should be settled upon trust (after the death of husband and wife) for "the issue of the intended marriage" as the husband should appoint, "but if only one child," for "such only child." There was no trust for the children in default of appointment. It was held (p. 558) that

"issue" must be construed "immediate issue, or children;" *Lees v. Lees*, Ir. R. 5 Eq. 549. See Rule 142, *ante*, p. 363, as to the implication of a gift in default of appointment.

General power of appointment cut down to power to appoint among children.

Where, according to the terms of the articles, the husband was to have a general power of appointment, and in default of appointment the trust fund was to be divided among "the issue of the marriage," it was held, first, that the power intended must, from the circumstances and purpose of the instrument, be taken to be only a limited power to appoint to "issue of the marriage," and, secondly, that "issue of the marriage" was to be construed "children:" *Bristow v. Warde*, 2 Ves. Jun. 336. Lord St. Leonards observes (*Sugd. Pow.* 8th ed. 439) that this case must not be considered as establishing a general rule; and see *Chance on Powers*, Ch. 5, sec. 2, p. 143; *Gould v. Gould*, 25 L. J. N. S. Ch. 642; *S. C.*, 2 Jur. N. S. 484. The latter case, however, was on a settlement executed; see *Farwell on Powers*, 78 *et seq.*, where the distinction is pointed out between executed and executory instruments as to the construction cutting down a power of appointment which is in its terms general. And in *Wood v. Wood*, L. R. 10 Eq. 220, Lord Romilly, M. R., refused to follow *Gould v. Gould* in construing an executed settlement. His Lordship said:—"The general principle is that a general power of appointment cannot be cut down to a limited power of appointment among children, except by express words;" and he held that "on the general scope of the deed" before him the general power could not be cut down.

As to the powers to be inserted (e).

Probably the powers to be inserted in the settlement would be the same whether the instrument directing the settlement to be made is a will, marriage articles, or other instrument. It was formerly considered that no powers ought to be inserted in the settlement, unless they were

(e) See 1 *Chance on Pow.*, ch. 3, s. 6, p. 95.

expressly authorised by the instrument directing the settlement to be made; see *Wheate v. Hall*, 17 Ves. 80; *Brewster v. Angell*, 1 J. & W. 625. There is a palpable difference (see *per Shadwell*, V.-C., *Hill v. Hill*, 6 Sim. at p. 144) between powers of management, such as powers of leasing or of sale, which are to be exercised for the benefit of the estate, and powers of charging the estate, such as powers of jointuring, and of charging portions. According to the modern practice, powers of the former class will generally be inserted in the settlement (unless they are omitted in reliance on the Settled Land Act, 1882), while powers of the latter class will not.

Powers of maintenance, education, and advancement, which appear not to fall under either class mentioned in the preceding paragraph, were directed to be inserted in the settlement in *Turner v. Sargent*, 17 Beav. 515, where by codicil the testator directed as follows:—"I further direct that all the property, real or personal, given in my said will to my daughter J., shall be so settled, to the exclusion of her present or any future husband, that the same may belong to my said daughter during her life, and be secured for the benefit of her children, if more than one, equally, after her death, so that the issue of any such child dying in my daughter's lifetime may take his or her parent's share."

Power to appoint new trustees was inserted in *Sampayo v. Gould*, 12 Sim. 426, where the contract of marriage was drawn up in the Portuguese language and executed according to the law of Portugal where the parties were residing, and contained a statement that the parties wished that it should be regulated, made binding, and carried into full and complete effect under the laws of England. A like power was inserted in a settlement made in pursuance of the directions contained in a will; *Turner v. Sargent*, 17 Beav. 515; *Lindow v. Fleetwood*, 6 Sim. 152.

(f) The powers of maintenance and education may in most cases be omitted, in reliance on the Conv. Act, 1881, ss. 42, 43.

Power to vary securities.

A power to vary securities was inserted in *Sampayo v. Gould*, 12 Sim. 426.

Powers of leasing, sale, exchange, &c.

In *Hill v. Hill*, 6 Sim. 136, the V.-C. was of opinion that a direction to settle authorised the insertion of (*inter alia*) "powers of leasing, of sale and exchange, and where there is any joint property or there are any mines, or any land fit for building purposes, powers of partition, of leasing mines, and of granting building leases," such powers being beneficial to all parties. But where the articles stipulated for a power to lease for twenty-one years, and all other usual powers, it was held that the insertion of a power to grant building leases for a longer term was not authorised; *Pearse v. Baron*, Jac. 158.

Where the articles (on a marriage in Scotland) stipulated that a settlement of estates in Ireland should contain "all the covenants, provisions, and conditions usually contained in marriage settlements made in England," and the draft settlement contained powers to grant building, repairing and mining leases, a reference was ordered to inquire whether the proposed powers were common in that part of Ireland in which the estates were situated; *Duke of Bedford v. Marquess of Abercorn*, 1 My. & Cr. 312.

Mining leases.

In a settlement of personal property, the parties covenanted to settle all future-acquired property upon the same trusts, &c., and subject to the same powers, &c., or as near thereto as the nature and tenure of the property would admit; *hekl*, that this covenant authorised the insertion in the settlement of subsequently-acquired freeholds, of a power to grant mining leases, the prior owner having granted such leases, though the mines had never been effectually worked under them; *Scott v. Steward*, 27 Beav. 367.

Partition.

A power to partition may be inserted; see *Hill v. Hill*, 6 Sim. 136.

Sale and exchange.

It was formerly thought that a power of sale and exchange could not be inserted without express authority; *Wheate v. Hall*, 17 Ves. 80; *Horne v. Barton*, Jac. 437; and *Brewster v. Angell*, 1 Jac. & W. 625, all cases of wills. However, it appears now to be the rule that, whether

there be a simple direction to settle (*Turner v. Sargent*, 17 Beav. 515; *Wise v. Piper*, 13 Ch. D. 848) or a direction that the settlement shall contain all usual clauses (*Hill v. Hill*, 6 Sim. 196; *Peake v. Penlington*, 2 V. & B. 311; *Duke of Bedford v. Marquess of Abercorn*, 1 Myl. & Cr. 312); a power of sale and exchange ought to be inserted.

In *Williams v. Carter*, Sugd. Pow. 8th edit. Append. p. 945, and in *Elton v. Elton*, 27 Beav. 634, where realty became, by the operation of a covenant for settling after-acquired property, subject to the same trusts as personality, as to which latter there was a power to vary investments, it was held that the settlement of the real estate ought to contain a power of sale and exchange, such power being as to realty analogous to the power to alter and vary as applied to personality. Realty subject to same trusts as personality.

Where a settlement of personality contained a power to the trustees to invest in the purchase of land to be held "upon such trusts as would best correspond with the then subsisting trusts," and that such purchased land "should be considered as personal estate for the purposes of the settlement," and there was no express power of sale over the lands so to be purchased, but there was a power to vary the investments of the settled personality; *held*, that the trustees had a power of sale over purchased land; *Tait v. Lathbury*, L. R. 1 Eq. 174.

Where by marriage articles the husband covenanted to settle his estate, subject to raising by any ways or means that he should think proper the sum of £15,000 by mortgage or otherwise; *held*, that he might raise the £15,000 by sale; *Tasker v. Small*, 6 Sim. 625; *S. C.*, 3 Myl. & Cr. 63. Power to raise money.

Where a power of sale ought to be given to the trustees, a power to give receipts would formerly also be given to them; *Turner v. Sargent*, 17 Beav. 515. But where on the construction of a will a power of sale by the tenant for life was to be inserted in the settlement, he was not Power to give receipts (g).

(g) The power to trustees to give receipts can now be omitted, in reliance on the Conv. Act, 1881, s. 36.

allowed a power to give receipts; *Cox v. Cox*, 1 K. & J. 251.

Powers to
portion or
jointure.

Powers to raise portions; *Higginson v. Barneby*, 2 S. & S. 516; *Grier v. Grier*, L. R. 5 H. L. 688; to jointure; *Duke of Bedford v. Marquess of Abercorn*, 1 My. & Cr. 312; were not allowed to be inserted in the absence of special directions. But in *Sackville-West v. Holmesdale*, L. R. 4 H. L. 548, under special circumstances the insertion of these powers was authorised.

*Expressio
unius, &c.*

It was once thought that the doctrine of *expressio unius est exclusio alterius* was applicable in determining what powers should be inserted, and that if the executory instrument expressly directed the insertion of specified powers, the words "usual powers" coming afterwards would only authorise the insertion of such usual powers as were *ejusdem generis* with those specially authorised; *Pearse v. Baron*, Jac. 158; *Hill v. Hill*, 6 Sim. 141; or even that they would not authorise the insertion of any other powers; *Brewster v. Angell*, 1 J. & W. 625; *Horne v. Barton*, Jac. 487; unless the words were in a distinct clause; *Lindow v. Fleetwood*, 6 Sim. 152. But it is probable that the doctrine would not now be followed.

Aliens (h),

In *Master v. De Croismar*, 11 Beav. 184, where the husband and some of the children were aliens, it was held that realty, becoming by virtue of a covenant to settle after-acquired property subject to trusts similar to those of personalty, must be sold.

(h) An alien can now acquire, hold and dispose of land in the same manner in all respects as a natural born British subject. The Naturalization Act, 1870, 33 & 34 Vict. c. 14, s. 2.

CHAPTER XXXIII.

GLOSSARY (*a*).

Abatement.—See DEFORCEMENT.

(*a*) The purpose of the authors ~~in~~ this Chapter has been rather to indicate sources from which further information may be derived than to write a treatise on the various matters comprised in it: and they have accordingly, in most cases, confined themselves to citations from, and references to, the authorities, and have made no attempt to discuss moot points.

On the meaning of many ancient terms relating to land and its tenure, and the ancient courts and jurisdictions, the following authorities may be mentioned:—

Bacon, Abridgment; Britton (Ed. Nichols, 1865, with the Glossary); Bracton; Brooke, Abridgment; Chitty on the Prerogative of the Crown; Comyns, Digest; Cruise, Digest; Digby, History of the Law of Real Property; Ducange, Glossary; Ellis, Introduction to Domesday; Elton, Tenures of Kent; Eyton, Key to Domesday; Flota; Glanville; Hale, Domesday of St. Paul's (Camden Soc.), and Register of Worcester Priory (Camden Soc.); Madox, History of the Exchequer, and Firma Burgi; Maine, Village Communities and Early Law and Custom; Manwood, Forest Laws; Morgan, England under Norman Occupation; Nasse, Agricultural Community of the Middle Ages (translated by Col. Ouvry for the Cobden Club); Nelson, Lex Maneriorum; Reeves, History of English Law; Spelman, Glossary; Stubbs' Constitutional History, and Select Charters with Glossary; Termes de La Ley.

Authorities
to ancient
terms.

In Co. Lit. 4 a. to 5 b. (inclusive) is given a list of words occurring in old deeds, with explanations; as they have never been indexed we give here an alphabetical list of them: Alnetum, Aqua, Arundinetum, Bercaria, Berquarium, Bruera, Bye, Clough, Coleberti, Combe, Cope, Dena, Dene, Denne, Dreuchs, Drosden, Dru, Druden, Druf, Drufden, Duna, Dunum, Ey, Falesia, Fermeholt, Filicetum, Fleth, Frassetum, Fraxinetum, Frustum, Frythe, Fundus, Girdland, Glyn, Grava, Haga, Haugh, Hirst, Holme, Holt, Hoo, Hope, Howe, Howgh, Hulmus, Hurst, Ing, Jampna, Joncaria, Juncaria, Knol, Lacerta, Lactarium, Lactitium, Lannemanni, Law, Lawe, Lawnd, Lea, Ley, Leswes, Lesues, Leuga, Lewad, Lewe, Lewed, Lound, Lupulicetum, Maretum, Mariscus, Mesiul, Mesuil, Mora, Pen, Poicaria, Rad-chemistres, Radinan, Roncaria, Ros, Runcaria, Ruscaria, Salicetum, Saliva, Sawce, Selda, Senticetum, Shaw, Socheman, Sokemanni, Solinum or Solinus, Stadium, Stagnum, Stanlawe, Stede, Stethe, Stowe, Sullerye, Sullings, Tacke, Taini, Tainland, Thainus regis, Twaite, Vaccaria, Varectum, Vervactum, Warectum, Wareccum, Wic, Wike, Worth.

List of words
in Co. Litt.
4 a, et seq.

Acre.—*See* MEASURES OF LAND.—Land may pass by the words “a certain number of acres of land,” and before 5 Geo. 4, c. 74, a jury might determine whether customary or statute acres were meant; *Waddy v. Newton*, 8 Mod. 275; 47 Ed. 3, 18, pl. 35.

It is not clear whether a contract for the sale of land by the customary acre is affected by 41 & 42 Vict. c. 49, s. 19, or by the repealed Act of 5 Geo. 4, c. 74; but it is probable that such a contract is not unlawful; *Giles v. Jones*, 11 Ex. 393; though, if the word “acres” is used alone, it must mean statute acres, according to Rule 13, *ante*, p. 65; *O'Donnell v. O'Donnell*, 1 L. R. Ir. 284; but consider *Portman v. Mill*, 2 Russ. 570.

As to the connection of an acre with the quantity of land that can be ploughed with a team in a day, see Seeböhm, Eng. Vill. Comm. 124; Ducange, s. v. *Diurnalis*; Spelm. Gloss. s. v. *Jornale*, *Jurnale*, *Juchus*. It must be remembered that the ox team in England has generally consisted of eight oxen, while in the south of Europe it has generally consisted of a pair (yoke) of oxen.

Advantage.—“Commodities, emoluments, profits, and advantages . . . all of which four words are of one sense and nature, implying things gainful;” *London v. Southwell*, Hob. at p. 804.

Advowson, Advocation.—The right of presentation or collation to a church; Co. Litt. 119 b; see Co. Litt. 17 b; Spelm. Gloss. s. v. *Advocatus*; 1 Burn's Eccles. Law, tit. *Advowson*.

The advowson of a church in T. passes by the words “hereditaments situate, &c., in T.,” Dy. 323 b; pl. 30. An advowson may pass by the words “lands and tenements,” 33 Ed. 3, cited *London v. Southwell*, Hob. at 304 (we have been unable to verify the reference); “*Ecclesia*,” Co. Litt. 17 b; *Rex v. Bishop of Norwich*, 1 Roll. Rep. at p. 237. As to what words pass it in a fine, see Shep. Touch. 12.

An advowson may be appendant to a manor, or reputed manor; *Long v. Hemmings* or *Heming*, 1 Leon. 207; S. C., Sav. 103; Cro. El. 209; *Eveleigh v. Turner*, Dy. 299 a, pl. 52;

but it is more properly appendant to the demesnes of the manor, and not to the rents or services; Co. Litt. 122 a. In this case it will pass by a conveyance of the manor, reputed manor, or demesnes alone, even without the words "with the appurtenances;" *Whistler's Case*, 10 Rep. 63 a. See *Bedle v. Beard*, 12 Rep. 4; *Hamlington's Case*, Dy. 70 b, pl. 41, note; *Bawell & Lucas' Case*, 2 Leon. 221. See as to the effect of a charter of feoffment of the manor granting the advowson separately, Dy. 48 b, pl. 3.

An advowson may also be appendant to a tenement; 32 Ed. 1, 89 (this reference is given in Viner, Ab., but we are unable to verify it); or to an acre; 18 Ed. 3, 52; 39 Ed. 8, 86 b, and see other cases as to an advowson being appendant, collected in 2 Viner, Ab. "APPENDANT." Where an advowson appendant to a manor was sold for a term of years created in the manor and advowson, which ceased as to the manor, the advowson, *i.e.*, the reversion of the advowson, passed by a subsequent conveyance of the manor with general words; *Rooper v. Harrison*, 2 K. & J. 86.

As to grants of advowsons by the crown, see Stat. de Prerogativa, 17 Ed. 2, Stat. 1, c. 15; Co. Litt. 121 b, note 2; *Holdsworth v. Fairfax*, 3 Cl. & Fin. 115; S. C., 8 Bing. N. S. 882; *Att.-Gen. v. Evelme Hospital*, 17 Beav. 366, and some of the cases cited above.

As to the difference between the advowson of half the church and half the advowson of the church, see Co. Litt. 17 b, 18 a; *Windsor v. Canterbury*, Cro. El. 687; S. C., *sub nom. Windsor's Case*, 5 Rep. 102.

Ager.—An acre, a hide; Spelm. Gloss. s. v.; Seebohm says (Eng. Vill. Comm. p. 167) that ager, agellus, or agellulus, was the word used by the ecclesiastical writers in the charters for the land belonging to a "ham."

Allodium.—"In the law of England we have not, properly, *allodium*, that is, any subject's land that is not, as it is (b), holden, unless you will take *allodium* for *ex solido*, as

it is often taken in the book of Domesday; and tenants in fee simple are there called *alodarii* or *aloarii*;" Co. Litt. 1 b; see also 5 a, and Spelm. Gloss. s. v. *Aloarius*. Ellis, Introd. Domesd., Vol. I., pp. 54, 55,

Altaragium.—Properly that which is offered on the altar, and the profit which arises to the priest by reason of the altar; Spelm. Gloss. It is sometimes said to include all vicarial or small tithes; but this construction will not be adopted unless the word occurs in an old endowment, and is supported by usage; *Franklyn v. St. Cross*, Bunb. at p. 79.

Amerciament.—Explained and distinguished from a fine; *Beecher's Case*, 8 Rep. 58 a; *Godfrey's Case*, 11 Rep. 42 a; Co. Litt. 126 b, *et seq.*: where the Latin for Amerciament is said to be *misericordia*; Spelm. (Gloss. s. vv. *Amerciamentum*, *Misericordia*) gives an explanation differing from that of Coke. The reason why an unsuccessful defendant was said in old time "to be in mercy, &c.," was that he was liable to be amerced for not having obeyed the King's writ immediately; see the references to Coke, *supra*.

See also as to Amerciament and Misericordia, 1 Madox, Exch. 526, Mad. *Firma Burgi*, 86, note (e); Nelson, Lex Maneriorum; Scriven on Copyholds; *Baldwin v. Tudge*, 2 Wils. 20, cited *post*, MANOR, note (a); and Reeves' Hist. English Law, ed. Finlason, vol. i. p. 280.

Ancient Demesne.—See Madox, *Firma Burgi*, 5; Y. B. 8 Ed. 2, 265; 9 Ed. 3, 18, pl. 2; *Doe d. Rust v. Roe*, 2 Burr. 1046; Challis on Real Prop. c. 5, citing 2nd Instit. 542; 4th Instit. 269; Coke, Compleat Copyholder; Hob. 188, *Hunt v. Burn*, 1 Salk. 57; *Abbot of Strata Mercella's Case*, 9 Rep. at 31 a; Nelson, Lex Maneriorum; Burton, Comp. s. 1081; Scriven on Copyholds; Hale, Hist. Com. Law, 112 *et seq.*

Annats, or Annates.—The first fruits of an ecclesiastical benefice; see 25 H. 8, c. 20; 26 H. 8, c. 3; 12 Rep. 45; Spelm. Gloss. s. v. *Annatæ*.

Appropriation.—The annexing of an ecclesiastical benefice to the proper and perpetual use of a spiritual corporation or college. See the cases collected in 3 Viner, Ab. 33 *et seq.*; *Britton v. Wade*, Cro. Jac. 515; *Grendon v. Bp. of Lincoln*, Plowd. 493; S. C., Bendl. 293; *Wright v. Gerrard*, Hob. 306. It does not pass by the word Advowson; *London v. Southwell*, Hob. at 304. See Phillimore, Eccl. Law, 272.

Approvement.—Where a man has common in the lord's waste, and the lord encloses part of the waste for himself, leaving sufficient common for the commoners. See this fully discussed in Williams on Commons, p. 103 *et seq.*; Hall on Profits a Prendre, ch. xxiii., pp. 344 *et seq.* See also 5 Viner, Common, Z. Aa; 3 Cruise, Dig. 76; Shelford, Real P. Statutes, 49.

Assart.—Grubbing woods in a man's own lands in a forest, so as to make the same arable. See Manwood, c. 9, s. 1, cited in Williams on Commons, 231. *Terra assarta* is also used for land recently reclaimed out of the lord's waste; see the Hundred Rolls, cited Seebohm, Eng. Vill. Comm. p. 34; Spelm. Gloss. s. v. *Assartum*; 4th Instit. 306, 307.

In the manor of Rotherfield, the descent of assart lands is different from that of the other copyholds; and in the manor of Bosham, assarts are called "Forrep" lands; 6 Sussex Archæol. Collections, 176.

Aumone.—Tenure by divine service as distinguished from frankalmoigne; Co. Litt. 96 b, 97 a; see 2nd Instit. 460; Britton, 164; Cowell, Law Diet.

Average.—*Avera*, *averiæ*, *averii*, *affri*; beasts of burden, oxen, farm horses; *Averagium*, the work done by them; particularly where it was done as a service due to the lord; Spelm. Gloss. s. v. *Avera*; 1 Ellis, Introd. Domesd. 263; Seebohm, Eng. Vill. Comm. 57, 297. *Averum*, means revenue, effects, goods; Spelm. Gloss. *ubi sup.*; Hale, Domesd. of St. Paul's (Camd. Soc.), Introd. lxvi.

Balk.—The unploughed strip between two *seliones*; Seebohm, Eng. Vill. Comm. 2, 20. But he also says (p. 3), that the *seliones* themselves are called balks by the country folk. See also the last quotation from the Vision of Piers Ploughman, at p. 19. The strips dividing the shots or furlongs are also called balks; Seebohm, 4. See *post*, COMMON FIELDS.

There appears to be no presumption of law that the balks are the property of the owners of the adjacent soil; *Godmanchester v. Phillips*, 4 Ad. & El. at pp. 560—561.

Baronia.—Formerly consisted of $13\frac{1}{2}$ knight's fees (not, as stated in 2nd Instit. 7, of $13\frac{1}{4}$ knight's fees), but afterwards it was more or less. The income of a knight's fee was £20, so that $13\frac{1}{2}$ knight's fees gave an income of $13\frac{1}{2} \times £20 = 13\frac{1}{2} \times 400$ shillings = 400 marks, the yearly income of a barony; Co. Litt. 69 a, *et seq.*; Selden, Tit. Hon., 2nd Ed., part 2, c. 5, s. 26, considers that a barony never consisted of a definite number of knight's fees. *Baronia* is also sometimes used for a manor or the lands comprised in it; for a house in London; for a hundred, especially in Ireland. The *Caput Baronie* was the principal house or castle on it; see Co. Litt. 31b, 69a, *et seq.*; Spelm. Gloss. s. v. *Baro*. See also 3 Cruise, Dig. Tit. XXVI., *Dignities*, Ch. 1, ss. 30 *et seq.*

Beast Gate.—The same as CATTLE GATE (*q. v.*).

Beneficium.—Used in the Civil and Canon Law for fee. Ecclesiastical Benefice “extendeth not only to Benefices of Churches Parochial, but to Dignities and other Ecclesiastical Promotions, as to Deaneries, Archdeaconries, Prebends, &c. And it appeareth in our Books that Deaneries, Archdeaconries, Prebends, &c., are Benefices with Cure of Souls; but that they are not comprehended under the name of Benefices with Cure of Souls within the statute of 21 H. 8, c. 13, by reason of a special proviso, which they had been, if no such proviso had been added, viz., Deans, Archdeacons, Chancellors, Treasurers, Chanters, Prebend, or a Parson, where there is a Vicar indowed;” 3rd Inst. 155. See Spelm. Gloss. s. v.

Benerth.—Service of the plough and cart; Co. Litt. 86a; Spelm. Gloss. s. v.; Cowell, Law Dict. s. v. *Benereth*. Elton (Ten. Kent, 34), says, "*Ben-erth* was precarious tillage service with horse and cart: *gavel-erth* was tillage-service certain: *ben-rip* is a precarious service of reaping, *gavel-rip* was the same service only certain."

Benework, or Boonwork.—See *PRECARIÆ*.

Bercaria or Berquarium.—A tan-house, a sheep-fold; Co. Litt. 5b; 2nd Inst. 476; Spelm. Gloss. s. v.; Cowell, Law Dict. s. v. (where some examples are given from old records).

Berewica or Berewit.—A town (vill); Co. Litt. 116a; a manor, or rather a detached member of a manor, a town, a hamlet, a sub-manor, a corn farm; Spelm. Gloss. s. v.; Cowell, Law D. s. v. *Berwica*; see also Ellis, Introd. Domesd. Vol. I., p. 240.

Bocland or Bookland.—See Co. Litt. 6a, 58a; Spelm. Gloss. s. v. *Bocland*; 1 Stubbs Constit. Hist. Ch. 5, 4th ed., p. 81; Ellis, Introd. Domesd., Vol. I., p. 230 n.

Boon.—See *PRECARIÆ*.

Borde; Bordarii; Borduanni.—Cottage and cottagers; Co. Litt. 5b; Spelm. Gloss. s. v. *Bordarii*; Eyton, Key Domesd. 47; Elton, Ten. Kent, 106, 120; Seeböhm, Eng. Vill. Comm. 77.

Bordlands.—Lands kept by a lord in his own hands for the maintenance of his table; Termes de la Ley, 100; Bract. lib. 4, tr. 3, cap. 9; Spelm. Gloss. s. v. *Bordarii*; Du Cange, Gloss. s. v. *Dominicum* (3); Elton, Ten. Kent, 120, note (e), gives an instance in modern times. See *post*, p. 571.

Boscus.—See *Wood*, and *ante*, p. 89.

Bote.—*House bote*; a sufficient allowance of wood to repair, or of wood or gorse to burn, in the house; the latter is also called *Fireboot*. *Ploughbote* and *cartbote* are wood to be em-

ployed in making or repairing instruments of husbandry. *Haybote* or *Hedgeboot* is wood for repairing hedges ("hayes") or fences. *Common of Estovers* is the right to cut wood for these purposes in another man's land; Spelm. Gloss. s. vv. *Bota*: *Estovarium*; Williams on Settlements, 230; Williams on Commons, *passim*. It may also mean amercement or compensation, as *theft bote*, *man bote*; or freedom from the same, as *brigbote*, *castlebote*, *burghbote*; Co. Litt. 127 a; Flcta, c. 47; Spelm. Gloss. s. v. *Bota*.

Bovate; Bovata terræ; Oxgang or Oxgate.—Half a yardland. (See COMMON FIELDS.)—It is said to be as much as an ox can plough; Co. Litt. 5a; Spelm. Gloss. s. v. *Bovata*. There is a manifest absurdity in this statement; for, in most parts of England, an ox could not draw a plough. It appears rather to be the holding of the tenant who contributed one ox to the manorial team of eight oxen. See Seebolm, Eng. Vill. Comm. 60 *et seq.*; Elton, Ten. Kent, 126, 130, 131. Land may be demanded (Co. Litt. 5 a), and therefore conveyed by the name of a *bovate*.

Bruera; Bruarium; Bruyrium.—A heath. Land may be demanded and therefore passed by a conveyance of *Bruera*; Co. Litt. 5 a; Spelm. Gloss. s. v. *Bruarium*.

Butt.—A piece of land; *e.g.*, Register of Worcester Priory, fol. 49 b (Camden Soc.). Where a selio abruptly meets others, or abuts upon a boundary at right angles, it is sometimes called a butt; Seeb. Eng. Vill. Com. 6.

Cablish.—Brushwood, or, more properly, windfalls; Spelm. Gloss. s. v. *Cablicæ*; browsewood; 4 Inst. 308.

Cantaria. See CHAUNTRY.

Cantred or Kantred.—Welsh for a hundred; Spelm. Gloss. s. v. *Cantredus*; used in 28 H. 8, c. 3, and 26 Ass. pl. 54.

Carucate or Carve.—A ploughland or hide. (See HIDE, PLOUGHLAND.) Co. Litt. 69a; Spelm. Gloss. s. v. *Carua*.

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It may contain houses, mills, pasture, meadow, wood, &c., pertaining to the plough, &c. ; Co. Litt. 86 b. It is said (*Dublin v. Blount*, 21 Ed. 1, 402 (Record Publ.)), that "a carucate of land draws to itself manor meadow wood and pasture as things that are appurtenant." This seems to be an example of Rule 51, *ante*, p. 188. Land may be demanded, Co. Litt. 5 a, and therefore pass by the name Carucate.

Castle.—"Regularly every castle containeth a manor — and by the name of the castle the manor shall pass, and by the name of the manor the castle shall pass ;" 2nd Inst. 31. "By the name of a castle one or more manors may be conveyed ;" Co. Litt. 5 a. As to when the castle alone, or the castle and land attached to it passes by grant of the "castle ;" see Shep. Touch. 92 ; *Mad. Baron. Anglic.* 17. Land may be parcel of a castle either by escheat where a man holds by castle guard, 5 H. 7, 9, p. 20 ; *Bro. Ab. Comprise*, 18 ; or where it is contained in the castle. See Spelm. Gloss. s. v. *Castellum* ; and Ellis, *Introd. Domesd.* I., 211.

Cattlegate, also called Beastgate.—Sometimes the soil is vested in the owners as tenants in common in fee ; *The King v. Whixley*, 1 T. R. 137. See also *Mellington v. Goodtitle*, Andr. 106, and on app. sub nom. *Bennington v. Goodtitle*, 2 Stra. 1084 ; a dictum in *Barnes v. Peterson*, 2 Stra. 1063 ; *The King v. Watson*, 5 East, 480 ; where the beasts were turned out by such burgesses as chose to do so, according to a stint by the lect jury. Sometimes it is a mere right of pasture, the soil remaining in the lord of the manor ; *Lonsdale v. Rigg*, 11 Ex. 654 ; on app. 1 H. & N. 923. See Williams on Commons, 81 *et seq.* ; Hall on Profits a Prendre, 23 *et seq.*

Cell ; Cella.—A monastery appertaining to a larger. Spelm. Gloss. s. v. *Cella*.

Chase. See FOREST.—A chase differs from a forest chiefly in that it is not subject to the forest laws ; *Chitty*, Prerog. 137.

If the King, seised of a forest, grants it to another in fee ; the grantee has no forest, because he has not power to create

judges or officers to hold forest courts; but he has a chase; 4th Inst. 314.

By the grant by a subject of a chase in his own land, not only the privilege but the land itself passes; Co. Litt. 5b. See Williams on Commons, 236 *et seq.*; Hall on Profits a Prendre, 325; 3 Cruise, Dig. tit. xxvii., s. 10 *et seq.*

A chase may be in a warren; 22 Ed. 1, 528 (Record Pub.).

Chauntry; Cantaria.—A foundation for the maintenance of priests to say mass for the souls of the founder and his relations; also a chapel or altar endowed for that purpose: *Adams and Lambert's Case*, 4 Rep. 104b; Ducange, s. v. *Cantaria*; Spelm. Gloss. s. v. *Cantaria*. In a grant by Henry 8th, to the Earl of Arundel, the words *ecclesia collegiata*, *collegium*, and *cantaria*, are used as synonyms; see *Norfolk v. Arbuthnot*, 4 C. P. D. at p. 302.

Chimin, Chiminage.—See WAY.

Church.—A private person can have a fee simple in a building constituting to the eye, and being in fact, an integral part of the fabric of a parish church, whether it occupies the place usually occupied by the chancel and Lady-chapel (*D. of Norfolk v. Arbuthnot*, 4 C. P. D. 290; S. C., 5 C. P. D. 390; 30 Sussex Archæol. Coll. 31 *et seq.*), or a lesser chancel or aisle; and in the latter case, it may be (*Churton v. Frewen*, L. R. 2 Eq. 634), but is not necessarily (*Chapman v. Jones*, L. R. 4 Ex. 273), claimed as appurtenant to a manor or manor house. In *Churton v. Frewen*, *ubi sup.*, it was held that the lord of the manor might have the exclusive use of the building, though the freehold was in the rector.

Common.—See BOTE; HERBAGE; FISHERY; PASTURE; PANNAGE; TURBARY.

Common Fields.—The arable lands of a township were generally cultivated on the three-fold course, *i.e.*, in three successive seasons of tilth grain, etch grain, and fallow. They were generally divided into large parcels called furlongs, shots, or *quarentenne*, separated from each other by broad strips left

untilled, generally covered with bushes, called balks (in Latin, *Balks. porca*). The shots were subdivided into a number of parallel strips; each of which was called a stiche or ridge (in Latin, *Ridge or selio. selio*), of uncertain dimensions, but usually forty rods in length by four in breadth, so as to make an acre. The stiches were separated by balks of untilled earth. In some places the word balk (and its equivalent *porca*), were used to denote the stiche.

Generally, access to the stiches was obtained by a road running along the edge of each shot; but when this was not the case, a strip at right angles to and at each end of the stiches, called a headland (in Latin, *forera*), was left unploughed till the last, so that the oxen could turn on it while ploughing the other stiches. Sometimes, from the shape of the field, besides the stiches, there were some plots broader at one end than at the other: these were called *gores, fothers*, or *pykes*. Headland. Gore.

The normal holding of a tenant was called a *virgate* or *yardland*, which consisted of a number of seliones (and perhaps of gores), in the several common fields. It consisted of an uncertain number of acres; Co. Litt. 69a; Nasse, *Agricult. Community* (trans. by Ouvry), p. 9: but there is some evidence to show that the normal virgate was from about thirty to forty acres. (In Wimbledon it consisted of fifteen acres.) As to the size of a virgate there is a source of confusion which should be remembered, namely, that the size may be estimated either in statutory or in customary acres. The holder of a virgate in old days appears to have contributed two oxen towards the common team of eight oxen by which the common fields were ploughed. A half virgate was called an *oxgang* or *bovate*, probably because the owner contributed one ox towards the common team. Virgate or yardland.

See Seebohm, *passim*; Fitzherbert on Surveying; Nasse, *Agric. Comm.*; Maine, *Village Communities*, Lect. III.; Morgan, *Eng. under Norman Occup. passim*.

Conmote or Commote.—"A commote is a great seigniory, and may include one or divers manors;" Co. Litt. 5a. See Shep. Touch. 92; *Att.-Gen. v. Reveley*, printed but not pub-

lished, 1870 (in Lincoln's Inn Library). It also equals half a cantred (which see). Spelm. Gloss. s. v. *Commotum*. See the Statutum Walliæ, 12 Ed. 1. "It is a tract of country like the hundred of a sheriff;" 22 Ed. 1, 374. (Record Pub.)

Coopatura.—A thicket of wood; 4th Inst. 307; Spelm. Gloss. s. v. *Coopertum*.

Cope.—A hill; Co. Litt. 4b. It is said in Tomlins' Law Dict. to be a custom or tribute, due to the King, or lord of the soil, out of the lead mines in some parts of Derbyshire.

Cottage; Cotagium.—"A little house without land to it;" Co. Litt. 56b. But it may extend to a curtilage, and implies a court and backside; *Emerton v. Selby*, 2 Ld. Raym. 1015; S. C., 6 Mod. 115; 1 Salk. 169; Holt. 174. See Shep. Touch. 94; Spelm. Gloss. s. v. *Cota*. By 31 El. c. 7 (repealed by 15 Geo. 3, c. 32), it was enacted that no new cottage should (with some exceptions) be built without having at least four acres of land annexed to it. See this discussed, 2nd Inst. 736.

County.—Co. Litt. 50a; Spelm. Gloss. s. v. *Comitatus*; *Schira*. Where "Counties, Ridings, and Divisions," are mentioned in an Act of Parliament, "County" applies to every county except Yorkshire and Lincolnshire; "Riding" to the Ridings of Yorkshire; and "Division" to the Divisions of Lincolnshire; *Frans v. Stevens*, 4 T. R. 459; and since 7 Will. 4 & 1 Vict. c. 53, s. 7, to the Isle of Ely; *Reg. v. Isle of Ely*, 15 Q. B. 827. As to the Counties Palatine, see 4th Instit. 204 to 222; Spelm. Gloss. s. v. *Comites*; Chitty, Prerog. 77.

Court.—Defined Co. Litt. 58a; Spelm. Gloss. s. v. *Curia*. A full account of most of the old Courts will be found in the 4th Instit. See also the index to Co. Litt.: the remarks of Sir H. Maine on the Manorial Courts, Village Commun. 639; and as to courts exercising criminal jurisdiction, Stephen, Hist. of Criminal Law, Vol. I.

Croft.—"A little close or pightle adjoining to a house, used either for pasture or arable, as the owner pleases. In many

places such close is called a HAM;" Shep. Touch. 95. In Latin, *Croftum*, *Croftus*, *Cruftum*; Spelm. Gloss. s. v. *Croftum*.

Curtilage.—"A little croft or court or place of easement to put in cattle for a time, or to lay in wood, coal, or timber, or such other things necessary for household;" Fitzherbert on Surveying, Chap. 1. Spelman considers it to be "the yard not the garden;" see s. v. *Curtilagium*, *Curtilum*; though it may be used for garden, he says: see *per* Fairfax, 21 Ed. 4, 52, pl. 15; and *per* Frowike, Keilw. 57, pl. 7, cited *post*, HOUSE.

Custom: Consuetudo.—"This word *consuetudo* hath in law divers significations; 1. For the Common Law, as *consuetudo Angliæ*; 2. For statute law, as *contra consuetudinem communi concilio regni edit.*; 3. For particular customs, as gavelkind, Borough English, and the like; 4. For rents, services, &c., due to the lord, as *consuetudines et servitia*; 5. For customs, tributes, or impositions, &c., as *de novis consuetudinibus levatis in regno sive in terrâ sive in aquâ*; 6. subsidies or customs granted by common consent, that is, by authority of Parliament, *pro bono publico*;" 2nd Instit. 58. *Consuetudo* signifies also "tolls, murage, frontage, paviage, and such like newly granted by the King;" Co. Litt. 58 b. See on this latter point, *Egremont v. Saul*, 6 A. & E. 924, and the cases there cited.

Custom is distinguished from prescription in Co. Litt. 113b; and as to within what places a custom may be alleged, see Co. Litt. 110b.

In 22 Ed. 1, 364 (Record Publ.), customs are distinguished from services as follows: "Customs are things which are done and demanded by reason of bodily service; services are things which are demanded of the tenant by reason of the tenement which he holds of the demandant, to wit, rent and things of that kind, or suit demanded by reason of the tenement."

Day-work.—In Kent a very common measure of land = 4 square perches of 16 ft. = $\frac{1}{16}$ of an acre; Elton, Ten. Kent, 180: it bears the same meaning in other places, see *post*, p. 572, p. (b).

Deforcement.—A disseisin is a wrongful putting out of him that is actually seised of a freehold. (See Co. Litt. 153 b.) And abatement is when a man died seised of an estate of an inheritance, and between the death, and the entry of the heir an estranger doth interpose himself and abate.

Intrusion: *First*, properly is when the ancestor died seised of any estate of inheritance expectant upon an estate for life, and then tenant for life dieth, and between the death and the entry of the heir, a stranger doth interpose himself and intrude. *Secondly*, he that entreth upon any of the King's demesnes, and taketh the profits, is said to intrude upon the King's possession. *Thirdly*, when the heir in ward entreth at his full age without satisfaction for his marriage, the writ saith *quod intrusit*.

Deforciamantum comprehendeth not only these aforementioned, but any man that holdeth land whereunto another man hath right, be it by descent or purchase, is said to be a deforceor;" Co. Litt. 277a; Co. Litt. 331 b.

Delfs.—This word "probably means open pits or diggings;" *Att.-Gen. for the Isle of Man v. Mylchreest*, 4 App. Cas. 294 at p. 308.

Demand.—Co. Litt. 291b; *Altham's Case*, 8 Rep. at p. 153b. Lease at a rent "for all exactions and demands." These words discharge the lessee from all rents and services, but not of suit of Court, or such things as are not then in demand; and therefore, the lease being made by a parson, not of tithes; *Parkins v. Hinde*, Cro. El. 161; *Stile v. Miles*, Ow. 39; S. C. sub nom. *Stile and Miller's Case*, 1 Leon. 300.

Demesne: Demeine: Domain: Dominicum: Terræ dominicales.—"Demains, according to the common speech, are the lord's chief manor place with the lands thereto belonging; *terræ dominicales*, which he and his ancestors have from time to time kept in their own manual occupation for the maintenance of themselves and their families; and all the parts of a manor, except what is in the hands of freeholders, are said to be demains. Copyhold lands have been accounted *demains*, because they that are the tenants thereof are judged in law to

have no other estate but at the will of the lord; so that it is still reputed to be, in a manner, in the lord's hands; but this word is oftentimes used for a distinction between those lands that the lord of the manor hath in his own hands, or in the hands of his lessees demised at a rack-rent, and such other land appertaining to the manor which belongeth to free or copyholders; Bract. lib. 4, tract. 3, c. 9; Fleta, lib. 5, c. 5; "Jacob, Law Dict., where it is said to be derived from *dominium*, and not, as some have supposed, from "*de manu*." (Cp. the Eng., "in hand," and Lat., "in manu," as used in the civil law.)

Britton, 205 b (Bk. III. ch. 15), says "Demeyne proprement est tenement qe chescun tient severalment en fee."

See also Cowell, Law Dict. s. v. *Demain*, and see Du Cange (Gloss.), under *Demainum*; *Demainium*; *Domanium*; *Domini-cum*; Bracton, f. 263a, where it is said to have the same meaning as BORDLANDS (*ante*).

The demesnes pass by a conveyance of the manor of which they form part. Shep. Touch. 92. It is therefore of importance on the sale of a manor to except any lands belonging to the vendor within the manor, which are not intended to be sold, as they may be demesne lands.

Kelham, Dict., gives *Demeigne*, *demenie*, *demeine*, meaning "own," a sense in which the word *demesne* (or some other form of the same word) is frequently used in the Year Books and other early documents (*a*). Prof. Skeat (Etym. Eng. Dict.), connects it with *dominium*, and says "*demesne*" is a false spelling, probably due to confusion with old Fr. *mesnee*, or *maisnie*, a household.

"*Seisitus in dominico suo ut (or sicut) de feodo suo*," seised in his demesne as of fee; Glanv. Lib. xiii., c. c. 2, 3. See Williams on Seisin, p. 6. See *Wrotesley v. Adams*, Plowd. at p. 191; and *per Lord Alvanley*, C. J., *Slade v. Dowland*, 2 Bos. & P. at p. 577; S. C. in error, 5 East, 272.

If a man "alleges seisin of things manurable (*b*), as of

(*a*) Britton, 32 a: "nos ministres demeynes," our own officers: *ib.*, 212 a "en son noun demeyne," in his own name.

(*b*) "Manurable;" the old sense was simply "capable of being worked at with the hand" . . . Manure is a contracted form of *manœuvre*, Low Lat. *Manu opera*, or *Manopera*: Skeat, Etym. Dict. s. vv. *Manure*, *Manœuvre*.

Wedgwood (Dict. Eng. Etym.) gives the derivation from Fr. *manouvres* (*manu*

lands, tenements, rents, &c., he shall say *quod fuit seisitus in dominico suo ut de feodo*; if of things not manurable, as of an advowson, &c., he shall say *ut de feodo et jure*, omitting *in dominico suo*;" Com. Dig. *Pleader*, C. 35, citing Litt. s. 10. The words of Littleton, rendered in Com. "things manurable" are "choses que home poet aver un manuell occupation, possession ou resceit;" things whereof a man may have a manual occupation, possession, or receipt; Co. Litt. 17a.

As to the proper mode of pleading the seisin of the sovereign, see 1 Rep. 28b (*the case of Alton Woods*); 2 Chitty on Pleading, 7th ed., 405 ("seised in her demesne as of fee (c) in right of her crown of England"); *Mounson v. Redshaw*, 1 Wms. Saund. 187 (vol. 1, p. 185, Ed. 1871).

As to the proper made of pleading the seisin of husband and wife, see 1 Wms. Saund. 253, n. (4) (vol. 1, p. 343, Ed. 1871).

Denariata, Denariatus Terræ.—An acre; Spelm. Gloss. s. v. *Fardella*. See MEASURES OF LAND.

Dene.—A valley. *Dena silvae*, a thicket of wood in a valley; Co. Litt. 4b; Co. Litt. 5b; see Spelm. Gloss. s. v. *Dena*. But it may mean a town; Co. Litt. 4b.

Deodand.—"Whatever personal chattel is the immediate occasion of the death of any reasonable creature, which is forfeited to the King, to be applied to pious uses, and distributed

operare) and the meaning to "hold, occupy, or possess." See also Cowell, Law Dict. s. v. *Minover*. Kelham (Norman Dict.) gives Mayneur, Mainour, Maynecure, as meaning "work, manure, occupy."

See also Spelm. Gloss. s. v., *Manopera*, where it is said that "manopere in our manors at the present day are called 'daies works.'"

(c) The words "as of fee" cannot, therefore, in this case, have the meaning ascribed to them in Williams on Seisin (p. 6), viz.: "an estate held feudally of another person." In the case of a fee tail, the words were "*ut de feodo talliato*." Cowell (Law Dict. s. v. *Demain*) explains the words "*ut de feodo*," to mean held of a superior lord; and says that "the application of these words to the King and Crown land is crept [in] by error and ignorance of the word fee." But, Britton, 205 b., 206 a., speaks of Seisin "*com de fee*," as of fee, in contradistinction to less estates; and this is the meaning given by Littleton, s. 1, supported by Coke and Hargrave. As to "fee," see also Digby, Hist. R. P. 3rd edit. 31 (n.), 59 (n.), 70 (n.).

in alms by his high almoner ; " Jacob, Law Dict. ; see Spelm. Gloss. s. v. *Deodanda* ; Chitty on Prerog. 153 *sqq.* ; Coke, 3rd Instit. cap. 9 ; and for two curious examples in which a horse and a tree were deodands, see Y. B. 30 & 31 Edw. I. (Record Publ., Appendix II., pp. 528, 529).

Dismes are **TITHES**.

Disseisin.—*See ante*, **DEFORCEMENT**.

Dole.—The share of any man in a lot meadow, or common meadow which is divided yearly and distributed by lots among the owners ; see Co. Litt. 4a ; Spelm. Gloss. s. v. *Dolae* ; Pratt v. *Groome*, 15 East, 235 ; Elton on Comm. 31 ; Williams on Commons, 90. The owner of a dole may have a freehold in the soil ; Co. Litt. 4a, 343b ; or he may have only vestura terræ ; *Tenants of Owning's Case*, 4 Leon. 43. See also as to lot meads, Wms. on R. P., Appendix C.

Driftway.—*See* **WAY**.

Duty, Debitum.—Extends to things due that are certain, not to what may become due on taking an account ; Co. Litt. 291a.

Erw.—The Welsh acre. *See* **MEASURES OF LAND**.

Essart.—*See* **ASSART**.

Estover.—*See* **BOTE**.

Estray.—*See* Williams on Commons, 286. Spelm. Gloss. s. v. *Extrahura* : 1 Blackstone, Comm. 297 ; 1 Bend. & Dal. 19 ; Britt. c. 17 ; *Constable's Case*, 5 Rep. at 108 b. Nelson, *Lex Maneriorum*, s. v. ; Fitzherbert, Surv. 54 ; Chitty, Prerog. 151 *et seq.* ; Co. Litt. 200 a. A subject may prescribe for estrays, *Foxley's Case*, 5 Rep. 109 a ; *Abbot of Strata Mercella's Case*, 9 Rep. at 276.

Estrepement.—Waste done or permitted by a tenant for life or years : Spelm. Gloss. s. v. *Estrepamentum*. As to the

writ of Estrepeinent, see the Statute of Gloucester, 6 Ed. I. c. 13 ; 2nd Instit. 327.

Fair.—*See* MARKET.

Faldage.—*See post*, FOLDCOURSE ; FRANKFOLDAGE.

Fallow.—*See* WARRECTUM.

Fardella; Ferdella; Fardendela; Fardingdela; Farding; Ferdingel; Farthindel; Farundel; Ferlingus.—A rod; Spelm. Gloss. s. v.; see MEASURES OF LAND. Cp. *Farthingale* or *Fardingale*, a hooped petticoat; see Skeat, Etym. Dict., where it is connected with old French *verdugalle*; Span. *verdugo*, a rod; and see Latham, Eng. Dict., giving the form *ferdigew*. See also Eyton, Key Domesd. 14 n.

Farm.—"Farm is a collective word, consisting of divers things collected together, whereof one is a messuage, and the others are the lands, meadows, pastures, woods, commons, and other things lying or appertaining thereto. And the messuage is not a common messuage, nor are the lands of the quality of other lands commonly lying to other messuages in the same town, but it is a capital messuage in a town, and the lands lying to it are great demesns, and more extensive in quantity than the demesns which lie to other messuages. And yet all this does not make it to be called a Farm, if it has not other things also, and that is, that it has been let or demised to another for life, for years, or at will, for if it has been always reserved in the hands of the inheritor thereof, it has not the name of a Farm (see *Robert's Case*, Moor, 176), so that a farm contains divers things; . . . and it is a capital messuage and a great demesn which have been let and demised, and so it is commonly taken in every place. . . . And such is the definition of a Farm as to the lessor and the lessee. But a farm is oftentimes used in other senses, for as to the lessee only, he may be said to be a farmer or whatever thing he has in lease; and that which he holds may, as to him, be called his Farm. . . . Also *Farm* has another sense, viz., it is called a rent reserved, and that is a common sense of the word ;"

Wrotesley v. Adams, Plow. at p. 195a ; see Co. Litt. 5a ; Shep. Touch. 93.

“ By the name of a *ferme* or *fearme*, *firma*, houses, lands, and tenements may pass. . . . Note, a farm in the north parts is called a *tack* ; in Lancashire, a *fermeholt* ; in Essex, a *wike* ; ” Co. Litt. 5a ; Plowd. 169. See other meanings of “ Farm,” Spelm. Gloss. s. v. *Firma*.

Farthing Land.—Probably this was land in the common fields, but we have been able to find no authority on the subject.

Farthing of Land.—Stated in Tomlins’ Law Dictionary to be a large quantity of land : *sed query*, see MEASURES OF LAND.

Fee Farm. See *post*, RENTS.

Ferry.—A liberty, by prescription or the king’s grant, to have a boat for passage upon a river for carriage of horses and men for reasonable toll ; *Termes de la Ley*, 388. Its termination must be in places where the public have rights, as towns, or vills, or highways leading to towns or vills ; *per* Lord Abinger, C.B., *Huzzey v. Field*, 2 C. M. & R. at 442 ; see also *Newton v. Cubitt*, 12 C. B. N. S. 32 ; on app., 13 C. B. N. S. 864 ; or on ground that the owner of the ferry has a right to use ; but he need not have the ownership of the soil at either end of the ferry ; *Peter v. Kendal*, 6 B. & C. 703 ; nor need he have the ownership of the water ; *Inhabitants of Ipswich v. Brown*, Sav. 11, 14. See the form of the king’s grant in *Pim v. Curell*, 6 M. & W. at 236. As to ferries, see also Woolrych on Ways, pp. 363 *sqq.* ; Coulson & Forbes on the Law of Waters, ch. 8, p. 486 : and see the cases collected 7 Fisher’s Dig., p. 786 *sqq.*, tit. *Way*.

Fine.—See AMERCIAMENT.

Firma Burgi is fully explained in 1 Stubbs, *Constit. Hist.*, 4th ed., 445 (see Madox, *Firma Burgi*). It appears that the king often agreed with the inhabitants of a vill to let to them the vill at fee farm. This did not pass to them

any rights over the soil, but only profits of the nature of those included in the farm of the shire. The inhabitants of the vill appear to have exercised the right of deciding as between themselves how the rent payable, to the Crown (sometimes called the annual fine), should be contributed by the holders of land in the vill. See an example of this in 29 Sussex Archæol. Collections, 120. As to the farm of a county or shire, see 1 Stubbs, Constit. Hist., 4th ed., 410.

Fishery : Piscary.—There appears to be some confusion between the names given to fisheries of different sorts. They are divided by Holt, C.J. (*Smith v. Kemp*, 2 Salk. 637; S. C., 4 Mod. 186; Carth. 285; Holt, 322; reported differently by Skin. 342), into (1) *Separalis Piscaria*, where he who has the fishery is owner of the soil; (2) *Libera Piscaria*, which is where a mere right of fishing is granted; and (3) *Communis Piscaria*.

But the term "several fishery" is sometimes applied to a right of fishing in public waters, which may be exerciseable by many people, and the term "free" fishery is sometimes applied to a several fishery, either in private or in public waters, and sometimes to a right of fishing in common with others; see 6 Bac. Abr. tit. *Piscary*, and *Bloomfield v. Johnston*, Ir. R. 8 C. L. 68, at pp. 107, 108, where Fitzgerald, B., after observing that, according to Blackstone, the name "free fishery" is properly applicable only to a several fishery in public waters (see 2 Bl. Comm. 39), said that "free fishery when used, as all admit it may be used, in the sense of a right of fishing not exclusive, is, if *in alieno solo*, not distinguishable from common of fishery."

In *Malcomson v. O'Dea*, 10 H. L. C. 593, where the question related to a fishery granted by the Crown before Magna Charta, Willes, J. (delivering the unanimous opinion of the judges), said: "Some discussion took place during the argument as to the proper name of such a fishery, whether it ought not to have been called in the pleadings (following Blackstone) a 'free' instead of a 'several' fishery. This is more of the confusion which the ambiguous use of the word 'free' has occasioned, from a period so early as that of the Y. B. of 7 H. 7,

fol. 13, down to the case of *Holford v. Bailey* (13 Q. B. 426), where it was clearly shown that the only substantial distinction is between an exclusive right of fishery, usually called 'several,' sometimes 'free' (used as in 'free warren'), and a right in common with others, usually called 'common of fishery,' sometimes 'free' (used as in 'free port'). The fishery in this case is sufficiently described as a 'several' fishery, which means an exclusive right to fish in a given place, either with or without the property in the soil."

See the meaning of "free" fishery discussed in Woolrych on Waters (2nd ed.), pp. 122 *et seq.*, where it is said that "to consider the free fishery as the same with common of fishery will be a reasonable as well as a legal conclusion."

Waters are either (a) Public or (b) Private :—

(a) In *Public* waters, *i.e.*, the sea and navigable rivers so Public waters. far as they are tidal, the right of fishing *prima facie* belongs to the public; but the Crown had power to create, either in favour of one person, or of a class of persons, a several fishery in public waters, until the passing of Magna Charta (9 Hen. III. c. 16), by which this power was taken away with a saving of grants made not later than the reign of Henry II.; see *Saltash (Mayor of) v. Goodman*, 5 C. P. D. 431; 7 Q. B. D. 106; 7 App. Cas. 633; Woolrych on Waters (2nd ed.), 131; *Malcomson v. O'Dea*, 10 H. L. C. 593, at p. 618; *per* Lord Blackburn, *Neill v. Duke of Devonshire*, 8 App. Cas. at p. 180; Williams on Commons, 267, 268. See the law as to public waters stated by Lord Blackburn, in *Neill v. Duke of Devonshire*, 8 App. Cas. at pp. 176 *seq.*: and see Woolrych on Waters (2nd ed.), ch. 5, pp. 76 *seq.*

See further as to a several fishery in a tidal navigable river, or in an arm of the sea; *Carter v. Murcot*, 4 Burr. at 2164; *Mayor of Orford v. Richardson*, 4 T. R. 437; *Free Fishers of Whitstable v. Gann*, 11 C. B. N. S. 387; in Ex. Ch. 13 C. B. N. S. 853; in Dom. Pro. 20 C. B. N. S. 1.

(b) In *Private* waters there may exist (1) *Common of* Private waters. *Fishery*, or *Piscary*; Wms. on Comm. 259; Hall on Prof. a Pr. 307; which can exist only in non-tidal rivers or in lakes, and is non-exclusive; and (2) *Several Fishery*, which is ex-

clusive, and the owner of which may or may not be owner of the soil; Wms. on Comm. 259; Hall on Prof. a Pr. 313: and it may exist in gross; Wms. on Comm. 264.

The general public cannot acquire by user, however long, a common fishery or right to fish in private waters; Wms. on Comm. 268, citing *Hudson v. Macrae*, 4 B. & S. 585: and see *Hargreaves v. Diddams*, L. R. 10 Q. B. 582; *Musset v. Burch*, 35 L. T. N. S. 486.

Ownership
of soil.

There has been much discussion as to whether the grant of a several fishery in private waters by the owner of the soil *primâ facie* implies a grant of the soil; see Woolrych on Waters (2nd ed.), pp. 111 *seqq.* According to Co. Litt. 4 b, the soil does not necessarily pass. See Mr. Hargrave's note, Co. Litt. 122 a; and Shep. Touch. 97. Plowden (170) mentions "*piscaries*" as examples of *hereditas incorporata*. It appears, however, from the recent decisions that the presumption now is that the soil passes: see *Smith v. Kemp*, 2 Salk. 637; S. C., Holt, 322; *Seymour v. Courtenay*, 5 Burr. 2814; *Duke of Somerset v. Fogwell*, 5 B. & C. 875; *King v. Ellis*, 1 M. & S. 652; *Holford v. Bailey*, 8 Q. B. 1000; S. C., 13 Q. B. 426; *Marshall v. Ulleswater Co.*, 3 B. & S. 732; S. C., 6 B. & S. 570; see these cases discussed and disapproved, Wms. on Comm. p. 259 *et seq.*, where it is stated (in accordance with the judgment of Cockburn, C.J., in *Marshall v. Ulleswater Steam Nav. Co.*, 3 B. & S. 732, at p. 746) that though the modern authorities have established the doctrine of a presumption that the soil does pass to the grantee; yet this doctrine is opposed both to principle and to the more ancient authorities. But see *Bloomfield v. Johnston*, Ir. R. 8 C. L. 68, esp. *per* Fitzgerald, B., at p. 105 *seq.* In the last-mentioned case it was held that the grant of a "*free*" fishery over the soil of the grantor is, as a matter of construction, and especially in a grant by the Crown, the grant of a fishery not exclusive: and evidence cannot be received to show that it was intended to exclude the grantor. The difference between the grant of a "*several*" and that of a "*free*" fishery was also considered with respect to the passing of the soil, and it seems to have been thought that, in the former case, the presumption is in favour of the soil passing, in the latter, against it. See

the cases collected in 3 Fisher's Dig., 1786 *et seq.*, and *Neill v. Duke of Devonshire*, 8 App. Cas. 135.

A several fishery may be appurtenant to a manor; *Rogers v. Allen*, 1 Campb. 309; and if the manor is destroyed, the right may still subsist in gross; *per* Lord Selborne, C., *Neill v. Duke of Devonshire*, 8 App. Cas. at p. 153; *per* Lord O'Hagan, *ib.*, at p. 169.

Common of fishery, sometimes also called free fishery, is the right of fishing in another man's water in common with the owner of the soil and perhaps also with other persons who may be entitled to the same right; Williams on Commons, 259. As this right is a profit à prendre it cannot be claimed by the inhabitants of a parish; *Bland v. Lipscombe*, 4 El. & Bl. 713 (note); S. C., 3 C. L. R. 261, or of a parish and manor; *Allgood v. Gibson*, 34 L. T. 883; S. C., 25 W. R. 60.

A *common fishery* (called by Hale, de Jur. Mar., cited 8 App. Cas., p. 177, "a public common of piscary"), which must be carefully distinguished from a *common of fishery*, or piscary, is a fishery which is free to all the public; *Benett v. Costar*, 8 Taunt. 183; S. C., 2 J. B. Moo. 83. It is submitted that a common fishery being a profit à prendre can only exist in a tidal river or the sea; *Pearce v. Scotcher*, 9 Q. B. D. 162, and the cases there cited.

See the cases collected in 16 Vin. Ab., "*Pischary*;" and see Coulson & Forbes on the Law of Waters, p. 338.

Foldcourse : Sheepwalk : Cursus Ovium.—The right of a man to pasture his sheep on the commonable grounds of a manor or superior lordship, without being obliged to fold them in the lord's fold. See *post*, **Frankfoldage**; Spelm. Gloss. s. v. *Faldagium*; Williams on Commons, p. 277, and the cases there cited; and *Robinson v. Duleep Singh*, 11 Ch. D. 798. Mr. Williams appears to have fallen into error in saying that this right is called "*Libertas faldagii*" and "*cursus ovium*;" Spelman (*ubi sup.*) explains "*libertas faldagii*" as the lord's right to have the tenant's sheep folded on his land; and this view is borne out by *Punsany and Leader's Case*, 1 Leon. 11.

Sometimes "Foldcourse" or "Sheepwalk" is used for the land itself on which the sheep feed ; Co. Litt. 6a.

Forera.—A headland ; Spelm. Gloss., s. v. *Forera* ; see *ante*, COMMON FIELDS.

Foreshore.—The sea shore up to the point of high water of medium tides, between spring and neap tides, is called the foreshore, and is ordinarily and *prima facie* vested in the Crown, subject to the rights of the Queen's subjects of fishing and navigation, not only in the sea, but in all tidal navigable rivers, and of passing over the foreshore itself ; but it may belong to a subject, either by itself, or as part of a manor : See the cases cited in Williams on Commons, 265 *et seq.* ; *Att.-Gen. v. Burridge*, 10 Pri. 350 ; *Att.-Gen. v. Parmenter*, 10 Pri. 378 ; *Att.-Gen. v. Tomline*, 14 Ch. D. 58. And see Co. Litt. 261a, note ; Woolrych on Waters (2nd ed.), 23 *sqq.* ; Coulson & Forbes on Waters, pp. 12 *sqq.* ; Chitty, Prerog. 207. See as to foreshore passing under ancient grants, *ante*, pp. 71, 72 ; and 6 Fisher's Dig., 1030 *et seq.*

Bathing.

There is no right at common law for the public to cross the foreshore for the purpose of bathing in the sea ; *Blundell v. Catterall*, 5 B. & Ald. 268 ; *Rex v. Crunden*, 2 Campb. 89 ; Woolrych on Waters, p. 7 *et seq.* ; Coulson & Forbes on Waters, p. 40 *et seq.*

Forest (see *ante*, CHASE), defined Spelm. Gloss, s. v. *Foresta*, Manwood, c. 1, s. 1. A subject may hold a forest by grant from the Crown ; Co. Litt. 233a ; provided that the grant contains a provision that on request made in Chancery, the grantee and his heirs shall have justices of the forest ; 4 Inst. 314. See the *Case of Leicester Forest*, Cro. Jac. 155.

By the grant of a forest in a man's own ground, not only the privilege, but the land itself passes ; Co. Litt. 5 b ; Shep. T. 96.

A forest may be appendant to an honor, and may be part of a manor, honor, or castle ; Jenk. 29, pl. 55 ; 26 Ass. 131, pl. 60. See also *Rex v. Bridges*, Palmer, 60, 87 ; S. C., sub nom. *R. v. Briggs*, 2 Rol. Rep. 189.

See 4th Instit. 289 *et seq.*; Spelm. s. v. *Foresta*; Manwood on the Forest Laws; Williams on Commons, p. 228 *et seq.*; 3 Cruise Dig. tit. xxvii., §. 2 *et seq.*; 13 Vin. Abr. "Forests;" Chitty on the Prerogative, 187 *sqq.*; *Att.-Gen. v. Downshire*, 5 Pri. 269.

Franchise or Liberty.—A royal privilege belonging either to the Crown or to a subject by virtue of a grant from the Crown, either express, or implied from long enjoyment; Williams on Commons, 228. The principal franchises are (1) Liberties to hold Courts; (2) grants of Jura Regalia and Counties Palatine; (3) grants of Forest Courts; (4) liberty to make a park; (5) the right of freewarren; (6) to have the goods of felons, &c.; (7) to have waifs and strays; (8) to hold a fair or market; (9) to keep a ferry.

See on Franchises, 3 Cruise, Dig. tit. xxvii., p. 244 *sqq.*; 2 Bl. Comm. 37; Chitty on the Prerogative, 118 *sqq.*, where it is said that "the *jura coronæ*, or rights of the Crown, as long as they are attached to the king are called prerogatives; but when such prerogatives are delegated to a subject, they acquire the appellation of franchises."

Where a common person has, by prescription or grant, liberties, which, if he had not, the King would have enjoyed throughout England, such as waif, estray, wreck, &c., there, if they come to the Crown by forfeiture or otherwise, they are extinguished and cannot afterwards come to the hands of a common person without a fresh grant; but on the other hand such liberties as a common person hath by grant or prescription, which the King would not have had by his prerogative, if such prescription were not, are not extinguished by their coming to the Crown, and will pass by the grant of a manor or a market "with all liberties, &c., in as full and ample a manner as A. had it:" see *Heddy v. Wheelhouse*, Cro. El. 558, 591; *The Abbot of Strata Mercella's Case*, 9 Rep. 24; *Whistler's Case*, 10 Rep. at p. 65a; *Reniger v. Fogossia*, 1 Plowd. at p. 12a. Notwithstanding *Rex v. Capper*, 5 Pri. 217; *Att.-Gen. v. Downshire*, 5 Pri. 269, this doctrine appears to be still law; *Northumberland, Duke of, v. Houghton*, L. R.

5 Ex. 127 : approved *Saltash, Mayor of, v. Goodman*, 5 C. P. D. at p. 442.

Frankfoldage—Faldagium—is the right of the lord of a manor or other person to have all the sheep within his manor, or within a certain vill or town, or other district, folded at night on his land, for the purpose of manuring it; see Williams on Commons, 274 *et seq.*, and the cases there cited; *Anon.*, Keilw. 198. The duty of the tenants to fold their sheep on the lord's land was called suit of fold, *secta faldæ*; Spelm. Gloss. s. v. *Faldagium*. See examples of frank foldage in 3 Ed. 3, 3, pl. 7; 8 Ed. 3, 37, pl. 48; stated 8 Rep. at p. 125 b; *The City of London's Case*. See *ante*, FOLDCOURSE.

Frankpledge.—See *post*, LEET.

Freewarren.—See *post*, WARREN.

Frith or Frydd (in Wales) a close. *Att.-Gen. v. Reveley*, printed for private circulation (in Lincoln's Inn Library).

Furlong: Ferlingus, or Ferlingum.—Is a furrowlong, which in ancient time was the eighth part of a mile; and land will pass by that name; Co. Litt. 5b.

It is also used for a division of the common field; Seebohm, 4; Spelm. Gloss. s. v. *Furlongus*.

See COMMON FIELDS; MEASURES OF LAND.

Gabel, Gavell, Gablum, Gaulum, Gabellum, Gabettum, Galtellethum, and Gavelletum.—A rent, custom, duty or service, yielded or done to the king or any other lord; Co. Lit. 142a. A rent; Elton, Ten. Kent, 29. A tax; Stubbs' Select Charters (Gloss.). See other meanings, Spelm. Gloss. s. v. *Gabella*. From the above comes—

Gale, still used for the taking of a mine in the West of England. To *gale* a mine, to acquire the right of working it; and *gale* is the common word in Ireland for a payment of rent, or for the rent due at a certain term; Wedgwood, Dict. Eng. Etym. s. v. *Gabel*.

Gorce, Gors, or Gort.—"A deep pit of water, consisteth of water and land, and therefore by the grant thereof by that name the soil passeth;" Co. Lit. 5b; and a widow shall be endowed of it; *Challenor. v. Thomas*, Yelv. 143. It is also used for *Weir*; Spelm. Gloss. s. v. *Gors*.

See the meaning of "gurgites," "gors," and "wears," discussed *per* Willes, J., in *Malcomson v. O'Dea*, 10 H. L. C. at p. 619. In the Register of Worcester Priory (Camd. Soc.), fol. 39 b, gurgites seem to be fisheries; see *ib.*, Hale's Introd., p. xcix., citing 25 Ed. 3, stat. 3, c. 4, and *post*, KIDEL.

Gore, Fother, or Pyke.—Parcels in the common fields; "and they are called so, because they be broad in the one end and a sharp pyke in the other end;" Fitzh. Surveying, ch. xxi.; Register of Worcester Priory, fol. 49 a; Seebohm, 6, 20. See **Common Fields**.

Grange.—"By the name of Grange, *Grangia*, a house or edifice, not only where corn is stored up like as in barnes, but necessary places for husbandry also, as stables for hay and horses, and stables and styes for other cattle, and a curtilage; and the close wherein it standeth shall pass; and it is a French word and signifieth the same as we take it;" Co. Litt. 5a. See Spelm. Gloss. s. v. *Grangia*. "Where land, meadow, and pasture, &c., belonging to such houses are called altogether by the name of a grange, then perhaps by this word the whole may pass;" Shep. Touch. 93a. See *Ognel's Case*, 4 Rep. 48b, where a farm was called Crewelfield Grange. In Lincolnshire and some of the northern counties every solitary farmhouse is called a grange; Tomlins' Law Dict. sub voc.

Ground. See **Land**.—Demise of "all that piece of ground or garden plot" passed houses built upon part of it; *Burton v. Browne*, Palm. 319; S. C., 2 Rol. Rep. 261—265; the reports are not easily reconcilable.

Haia, a park. 4th Instit. 294; Spelm. Gloss. s. v.; also a net for catching conies; *ibid.*, and see Latham's Eng. Dict. s. v. *Hay*; and 1 Ellis, Introd. Domesd. pp. 114, 115.

Halymote. Spelman (Gloss. s. vv. *Haligemot*, *Halimotus*, and *Halmot*) explains this word to mean a meeting of the Lord's Court Baron, or of wards and societies (guilds) in boroughs and cities (*ex. gr.*, the Court of a London Company; 4th Instit. 249). The word is still in use in some places; Toml. Law. Dict. s. v., not only for the Court, but also for the manor itself, as in *Smith v. Brownlow*, L. R. 9 Eq. 241.

Spelman, *ubi sup.* says that it is also used to mean an Ecclesiastical Court; see 4th Instit. 321.

Ham, properly a house; 4th Instit. 294: a vill; a piece of ground shaped like the ham of the leg; Spelm. Gloss. *sub voce*. We have not found any reported case in which a manor passed by the name of "ham;" but see Seebohm, Eng. Vill. Comm. 126, 254, 127. In many places a croft is called a ham; Shep. Touch. 95.

Hamlet, in common acceptance used for a vill; *per* Kenyon, C. J., *King v. Morris*, 4 T. R. at 552. Spelman (Gloss. s. v. *Hamel*) and Holt, C. J. (*Anon.*, 12 Mod. 546, pl. 912) consider it to be a part of a vill. See 14 Ass. pl. 8; Dyer, 142 b; *Articuli Statuti Exonie*, 14 Ed. 1 (9 Ruff. App. 15). The distinction seems to be that a vill has a constable, and a hamlet has none: *Rex v. Hewson*, 12 Mod. 180, S. C. sub nom. *Chorley's Case*, Holt, 153; 1 Salk. 175; *R. v. Horton*, 1 T. R. 374 at 376, *per* Buller, J.

See TOWNSHIP, *post*.

Haybote, *i.e.*, hedgebote. See s. v. BOTE.

Hedge.—"No man making a ditch can cut into his neighbour's soil; usually he cuts it to the very extremity of his own land; he is of course bound to throw the soil which he digs up on to his own land; and often . . . he plants a hedge on the top of it": *per* Lawrence, J., *Vowles v. Miller*, 3 Taunt. at p. 138. See *Guy v. West*, 2 Selw. N. P. 1287.

In many parts of England it is considered that the land of the owner of the hedge and ditch *primâ facie* extends for 3 feet from the stake of the hedge; but it appears that this is

not correct, and that it really extends to the edge of the ditch adjoining his neighbour: *Vowles v. Miller*, *ubi, sup.*

At common law, the owners of adjoining closes are not bound to fence either against or for the benefit of each other, but in the absence of fences each owner is bound to prevent his cattle or other animals from trespassing on his neighbour's premises. By prescription, however, a landowner may be bound to maintain a fence on his land for the benefit of the owner of the adjoining close: *Lawrence v. Jenkins*, L. R. 8 Q. B. at 278. The same rule in the absence of agreement appears to hold between landlord and tenant: *Erskine v. Adeane*, L. R. 8 Ch. 756.

See Hunt on Boundaries.

Herbage. *Vestura terræ*.—"If a man hath 20 acres of land, and by deed granteth to another and his heirs *vesturam terræ*, and maketh livery of seisin *secundum formam chartæ*, the land itself shall not pass, because he hath a particular right in the land: for thereby he shall not have the houses, timber-trees, mines, and other real things, parcel of the inheritance, but he shall have the vesture of the land, (that is) the corn, grass, underwood, sweepage, and the like, and he shall have an action of trespass *quare clausam fregit*. The same law, if a man grant *herbagium terræ*, he hath a like particular right in the land, and shall have an action *quare clausam fregit*; but by grant thereof and livery made, the soil shall not pass, as is aforesaid. If a man let to B. the herbage of his woods, and after grant all his lands in the tenure, possession, or occupation of B., the woods shall pass, for B. hath a particular possession and occupation which is sufficient in this case;" Co. Litt. 4 b.

It is pointed out in Williams on Commons (p. 19) that Coke did not mean to say that livery was necessary in this case, but that, if there be a grant by deed, notwithstanding the livery the soil does not pass.

On the other hand, it is said that by a grant of the profits of land or *vestura terræ* (14 H. 8, 6 b), or of *vestura terræ* for term of life (*Anon.*, Keilw. 118, pl. 60), the land itself passes. In the *Bishop of Oxford's Case*, Palmer, 174, a distinction is

drawn between a grant of *vestura terræ* and *prima vestura terræ*, and it is said that the soil passes by a grant of *vestura*, but not of *prima vestura*. In *Potter v. North*, 1 Vent. at 393, it is argued that *vestura terræ* must mean all the profits of the land, so that the land must pass by a grant of it. But *The Tenants of Owning's Case*, 4 Leon. 43, pl. 118; S. C., Ow. 37, is in favour of Coke's opinion. See *post*, RENTS AND PROFITS.

A man may prescribe or allege a custom to have and enjoy *solam vesturam terræ* from such a day till such a day, and hereby the owner of the soil shall be excluded to pasture or feed there: Co. Litt. 122 a. *Sir G. Sparke's Prescription*, Winch. 6.

The meaning of "herbage" was much discussed in *Earl de la Warr v. Miles*, 17 Ch. D. 535.

Sweepage.

Spelman (Gloss. s. v. *Herbagium*) restricts *vestura terræ* to that which is taken by the mouths of animals; but "sweepage" in the passage cited from Co. Litt. appears to mean "by mowing." See Ducange, s. v. *Herbagium*.

See also as to herbage, *prima vestura*, &c., Hall, Prof. a Pr. Ch. 3, pp. 18 *sqq.*

Hereditament.—"Whatsoever may be inherited is an hereditament, be it corporeal or incorporeal, real or personal, or mixed;" Co. Litt. 6 a.

"There is no question but a manor may pass by the word "hereditaments";" *per* Ld. Hardwicke, *Norris v. Le Neve*, 3 Atk. 82.

A use is a hereditament: Plowd. 58; 3 Rep. 2 b.

• A condition is a hereditament: 3 Rep. 2 b.

An annuity in fee is a hereditament: "A mere personal thing, as an annuity, may be an hereditament, though held for a chattel interest, or an interest merely of freehold, when that interest is carved out of a larger estate which is of inheritance." . . . "Though an estate for years be not a hereditament, it may be an estate in a hereditament, and therefore the subject may pass:" Shep. Touch. 91.

"*Hæreditas corporata* is such as messuage, land, meadow, pasture, rents, and the like, which have substance in them and may continue always. But *hæreditas incorporata* is such as

advowsons, villains, ways, commons, courts, piscaries, and the like, which are or may be appendant or appurtenant to inheritances corporate; and such things are and may be termed appurtenances;” Plowd. 170.

“Here is implied a division of fee or inheritance, viz., into corporeal, as lands and tenements which lie in livery, comprehended in this word *feoffment*, and may pass by livery by deed, or without deed, which of some is called *hereditas corporata*; and incorporeal (which lie in grant, and cannot pass by livery, but by deed, as advowsons, commons, &c., and of some is called *hereditas incorporata*, and by the delivery of the deed, the freehold and inheritance of such inheritance as doth lie in grant doth pass), comprehended in this word *grant*;” Co. Litt. 9 a (d).

There are some remarks on the word “hereditament” as used in the Statute of Frauds in the judgment in *Buckeridge v. Ingram*, 2 Ves. Jun. 652, 662 *et seq.*

Hide or Hyde.—See the meaning of this discussed in 1 Stubbs, *Constit. Hist.* (4th ed.), 21, 79, 185, 287; Elton, *Ten. Kent*, 126; Spelm. *Gloss. s. v. Hida*; Ellis, *Introd. Domesd.* vol. i. pp. 145 *sqq.*; Eyton, *Key to Domesd.* See *ante*, CARUCATE; *post*, MEASURES OF LAND, PLOUGH LAND.

“One plowland, *carucata terræ*, or a hide of land, *hida terræ* (which is all one), is not of any certain content, but as much as a plow can by course of husbandry plow in a year. .

. . . And a plowland may contain a messuage, wood, meadow, and pasture, because that by them the plowmen and the cattle belonging to the plow are maintained;” Co. Litt. 69 a. See *post*, MEASURES OF LAND, as to the distinction between the hide as a measure of land and as the unit of taxation. In Anglo-Saxon times it was sometimes used as *terræ familiæ, mansus*. Land may pass by the name of Hide; Shep. Touch. 12.

See, as to the size of the ancient hide in Kent (40 acres),

(d) The Act to amend the Law of Property, 8 & 9 Vict. c. 106, renders every feoffment, except a feoffment made under a custom by an infant, void unless evidenced by a deed, and by the same Act, all corporeal hereditaments are made to lie in grant.

Elton, Ten. Kent, 127 ; but *ibid.*, p. 128, in later times a hide was a piece of arable land containing in general 120 acres. In the manors of St. Paul's the hide generally contained 120 acres, or 4 virgates of 30 acres, but there were local variations ; Domesday of St. Paul's (Camd. Soc.), Introd., p. xiii. ; *ibid.*, lxii.

Honour.—" By the name of an honor which a subject may hold divers manors and lands may pass ;" Co. Litt. 5 a : Shep. Touch. 92. See more as to the nature of an honour, *The King v. Levet*, 1 Buls. 194 ; 2 Rol. Ab. 72 ; 14 Vin. 308 *et seq.* ; Co. Litt. 108 a ; Mad. Bar. Ang., Bk. 1 ; Spelm. Gloss. s. v. *Honor*.

A list of the Honours now existing will be found in Tomlins' Law Dict. *sub voce*.

House.—(See MESSAGE.) In Keilw. 57, pl. 7, Frowike, C.J., seems to draw a distinction between *domus*, house, and *messuagium* ; "*Domus* ne poit estre intende auter chose forsque les choses en building, mes *messuagium* serra dit tout le mansion lieu, et les curtelages serra prise come parcel del *domus*, mes garden nemy en lun case ne en lauter, &c." See Co. Litt. 5 b, Mr. Hargrave's Note (1) : *Doe d. Clements v. Collins*, 2 T. R. 498 ; *Gulliver d. Jeffreys v. Poyntz*, 2 W. Bl. 726 ; S. C., 3 Wils. 141 ; *Doe d. Lempriere v. Martin*, 2 W. Bl. 1148. (These were cases on Wills.) "There is no difference between *domus* and message," *per* Fairfax, 21 Ed. 4, 52, pl. 15. "An acre or more may pass by the name of a house ;" Co. Litt. 5 b. See also Shep. Touch. 94, where it is said that as much passes by "house" as by "message." By house the curtilage passes : *St. John v. Piott*, 2 Buls. at 113.

"By the grant of a house, the doors, windows, locks and keys do pass as parcel of it, albeit at the time of the grant they be actually severed from the house ;" Shep. Touch. 90.

Hundred.—As to the meaning of Hundred, see Spelm. Gloss. s. vv. *Hundredus*, *Wapentachium* ; 1 Stubbs, Constit. Hist. (4th ed.) 103 *et seq.* ; Ellis, Introd. Domesd. I. 184 *sqq.* ;

Com. Dig. *sub voc.*; Palgrave, Eng. Comm. I., 96 foll. As to the Hundred Court, see 4th Inst. 267.

A Hundred, *i.e.*, the Court of the Hundred (which is of the nature of a Court Baron; 8 H. 7, 1; 12 H. 7, 17) belongs to the Crown of common right, and can only be acquired by a subject by grant from the Crown, or prescription; 11 H. 4, 89, pl. 44; Co. Litt. 114 b. This Court can neither fine nor imprison, but can amerce; *Godfrey's Case*, 11 Rep. at p. 43 b.

A grant by the Crown passes (1) the Hundred Court, with implied powers of making a bailiff; (2) generally, the Leet of the Hundred (see *Davies v. Lowden*, Cart. 28; *Exeter v. Smith*, Cart. 177); (3) sometimes, the *retorna brevium*: *per Hale*, C.B., *Atkyns v. Clare*, 1 Vent. at 403. As to whether the Leet passes by a grant of the Hundred, see *Style v. Abbot of Teukesbury*, 8 H. 7, 1; 12 H. 7, 15.

A grant of the Hundred by a subject passes only the franchises, and not his lands within the Hundred: *per King*, C., *Bays v. Bird*, 2 P. Wms. at p. 400.

A Hundred may be parcel of a castle or manor: *Lutterel's Case*, 4 Rep. at 88 b; and may be appurtenant to a manor, 11 H. 4, 89, pl. 44.

By 2 Ed. 3, c. 12, and 14 Ed. 3, c. 9, Hundreds that had been granted by the Crown for any estate less than a fee simple were rejoined as to the bailywick of the same to the counties; and all grants made of the bailywick of the Hundred since that time are void; 4th Instit. 267: *The King v. Kingsmill*, 3 Mod. 199; *Cole v. Ireland*, 2 Show. 98; S. C., T. Raym. 360; T. Jones, 194.

In Yorkshire, Lincolnshire, Nottinghamshire, Derbyshire, Northamptonshire, Rutland, and Leicestershire, the word "Wapentake" (see Ellis, Introd. Domesd. vol. i., pp. 180, *sqq.*) is used instead of Hundred; and to the north of these districts the word Ward is generally used instead of Hundred; 1 Stubbs, Constit. Hist. (4th ed.) 103 *et seq.* In Ireland a hundred is sometimes called a Barony; Spelm. Gloss. s. v. *Baronia*.

Husbandland, used for yardland in the North of England; Seebohm, Eng. Vill. Comm. 61.

Inland.—Demesne land; Spelm. Gloss. s. v. But see Elton, Ten. Kent, 33. See Hale, Domesd. of St. Paul's Introd. xxii.; 1 Ellis, Introd. Domesd. p. 230; and *ante*, s. v. DEMESNE.

Kidel or Kiddle.—"Kidels is a proper name for open weirs whereby fish are caught;" 2nd Instit. 38. "Weirs (kidelli or gurgites) were the means usual in ancient times for appropriating and enjoying several fisheries in tidal waters:" per Lord Selborne, C., *Neill v. Duke of Devonshire*, 8 App. Cas. at p. 144; see Spelm. Gloss. s. v. *Kidellus*. As to the meaning of "gurgites," see *ante*, GORCE.

Knightsfee.—"The word 'knight's fee' is a compound word, and may comprehend many things, and therefore by the grant of this [a knight's fee] may pass land, meadow, and pasture as parcel of it. And sometimes by this doth pass so much land as to make a knight's fee; and some say that it doth contain 8 hydes of land. And it seems also that a manor may pass by this name, if it be usually called so;" Shep. Touch. 92, 93; Co. Litt. 5 a; Mich. 12 Ed. 2, 358; and see Cowell, Interp. s. v.

Probably it does not contain any certain number of acres. See this discussed Co. Litt. 69 a; 2nd Instit. 596; Spelm. Gloss. s. v. *Feodum*, p. 218 b; 1 Stubbs, Constit. Hist. 287; 1 Mad. Exch. 322. Digby, Hist. Real Prop. 3rd ed., pp. 35, 60 n, 72. See *post*, MEASURES OF LAND.

Lammas Meadows.—Meadows in which rights of common exist, formerly after the 1st August, but now, by virtue of 24 Geo. 2, c. 23, after the 12th August. See Maine, Village Communities, and per Jessel, M.R., *Baylis v. Tyssen-Amhurst*, 6 Ch. D. at p. 507.

Land.—"Terra, in the legal signification, comprehendeth any ground soil or earth whatsoever; as meadows, pastures, woods, moors, waters, marishes, furzes, and heath. *Terra est nomen generalissimum, et comprehendit omnes species terræ*; but properly, *terra dicitur a terendo quia vomere teritur*; and anciently it was written with a single r; and in that sense it

included whatsoever may be plowed; and is all one with *arvum ab arando*. It legally includeth also all castles, houses, and other buildings; for castles, houses, &c., consist upon two things, viz., land or ground, as the foundation or structure thereupon; so as, passing the land or ground, the structure or building thereupon passeth therewith. . . . And, lastly, the earth hath in law a great extent upwards, not only of water, as hath been said, but of air and all other things even up to heaven; for *cujus est solum ejus est usque ad cælum*;" Co. Litt. 4 a. See as to this maxim, *Doe v. Burt*, 1 T. R. 701; *Corbett v. Hill*, L. R. 9 Eq. 671; *In re Metropolitan District Ry. Co. and Cosh*, 13 Ch. D. 607, *per* Fry, J., at p. 612; *per* Jessel, M.R., at p. 620.

"The word 'land' strictly doth signify nothing but arable land; but in a larger sense it doth comprehend any ground, soil, or earth whatsoever. And therefore by a grant of all lands, do pass arable lands, meadows, pastures, woods, moors, waters, marishes (marshes), furzes, heath, and such like, and the castles, houses, and buildings thereupon, but not rents, advowsons, and such like things. Also by grant of any land in possession, the reversion thereof will pass. And yet by the grant of a reversion of land, the land in possession will not pass;" Shep. Touch. 91.

Houses, mills, and wood; *Ewer v. Henden*, Ow. at 75; S. C., 2. And. 123; 2 Rol. Ab. 57, pl. 7, sub nom. *Ewer v. Hayden*, Cro. El. 476, 658; *Luttrel's Case*, 4 Rep. at 87 b; the grantor's interest in a common field; Co. Litt. 4 a; mines, earth, clay, quarries; 14 H. 8, 1; Shep. Touch. 90; running water: *Canham v. Fish*, 2 Cr. & J. 126; S. C., 2 Tyrw. 155; may pass by the name of "land."

In the King's letters patent, land passed by the name of "The Serjeanty of C.;" Mich. 12 Ed. 2, 358.

See *post*, RENTS AND PROFITS.

Law Day:—"Alias dicitur de Visu franci plegii, vulgo Leta; alias de curia comitatus juxta Stat. 1 Edw. 4, c. 2;" Spelm. Gloss. s. v.; Shep. Touch. 92 note (96). See instances of Law days of a Hundred Court, Y. B. 40 Ed. 3, pp. 191, 193 (Record Publication).

Leet.—A court leet, or view of frank pledge, is a court of record, and is derived out of the sheriff's Tourn; *Rex v. Hewson*, 12 Mod. 180. It is holden before the Steward, who is judge thereof; 4th Instit. 261; and has the same power as the sheriff in his Tourn; 22 Edw. 4, 22; and may be created by the King; Brownl. 36. See more about leets, 2nd Instit. 70 *et seq.*; 4th Instit. 261; Spelm. Gloss. s. vv. *Folkemote*: *Leta*; Stubbs, Constit. Hist.; Williams on Commons, 271; and 6 Viner. Ab. tit. *Court Leet*.

As to whether a leet passes by the grant of a hundred or manor, see *ante*, HUNDRED, *post*, MANOR.

That a Court leet can fine but not imprison, see *Godfrey's Case*, 11 Rep. 43 b; and that it can amerce, see *Brook v. Hustler*, 11 Mod. 75; S. C., 1 Salk. 56. See it distinguished from the Ct. Baron in *Delacherois v. Delacherois*, 11 H. L. C. 62; S. C., 4 N. R. 501.

Librata Terræ: = 240 acres; Spelm. Gloss. s. v. *Fardella*. See *post*, MEASURES OF LAND. For other meanings, see Tomlins' Law Dict. s. v.

Lot Meads.—See DOLE.

Lynches or Linces.—The banks between the terraces formed where a common field is on a hill side by ploughing, so as to turn the sod down hill: also the terraces themselves; Seebohm, Eng. Vill. Comm. 5.

Manor.—The meaning of manor is discussed in 1 Cruise, Dig. tit. *Tenures*, Ch. 3. It consists of demesne lands, *i.e.*, those retained by the lord or granted out for an estate less than fee simple (see *ante*, DEMESNE), tenemental lands, *i.e.*, those granted by the lord in fee simple at certain services, and a Court Baron, which is incident to it of common right; 34 H. 6, 49; Coke, Compleat Copyholder, s. 31; see *Rex v. Stafferton*, 1 Buls. 54; see also, as to Courts Baron, *Holroyd v. Brcare*, 2 B. & A. 473, and *Baldwin v. Tudge*, 2 Wils. 20 (where it was held that the amercement of a freeholder by the Ct. Baron must be affected by his peers, *i.e.*, freeholders of the manor); Com. Dig. tit. *Copyhold*, R.

Where there was formerly a manor in several hamlets, each hamlet may become a manor by long continuance ; *per* Herle, J., Mich. 8 Ed. 2, 250.

A manor may contain several towns ; Co. Litt. 5 a, 58 a ; and a town may contain several manors ; *Whittier v. Stockman*, 2 Buls. at p. 87 : see *post*, p. 625, note (s).

A manor very seldom extends over more than one parish, but there are often several manors in one parish ; 1 Black. Comm. 113 ; Com. Dig. *Advowson*, A.

See as to the origin and growth of Manors, Digby, *Hist. Real Prop.*, especially Ch. iv. ; Stubbs, *Const. Hist.* Bishop Stubbs says (Vol. I., 4th ed., p. 296), that " the name ' manor,' is of Norman origin, but the estate to which it was given existed in its essential character long before the Conquest." And again, Vol. I., c. 11, s. 129, " The manor itself was, as Ordericus tells us, nothing more nor less than the ancient township, now held by a lord who possessed certain judicial rights varying according to the grant by which he was infeoffed." According to Sir H. Ellis, " *Villa* in the Domesday Survey was another term for a manor or lordship " (Introd. Domesd., Vol. I., p. 240).

See further as to the connection between the mark or village community and the manor, Maine, *Village Communities*, lect. 3, lect. 5, pp. 181 *sqq.* ; and Maine, *Early Law and Custom*, pp. 302, 313, and note A, p. 329 *sqq.* ; Seebohm, *Eng. Village Comm.*, *passim* ; and see *post*, *TOWNSHIP* ; particularly the quotations from Britton, Bracton, and Fleta there given.

Much light is thrown upon the constitution and details of the ancient manors by the Hundred Rolls (temp. Hen. III.—Edw. I.) : and the 4 Edw. I., Stat. 1, called *Extenta Manerii*, with which compare the particulars given in the Register of Worcester Priory, fol. 24 b ; and see the note thereon by Archd. Hale (Camd. Soc. 1865).

" This word ' Manor' is a word of large extent, and may comprehend many things (Plowd. 168). And therefore by the grant of a manor, without the words of *cum pertinentiis*, do pass demesnes, rents, and services (see Co. Litt. 310 b, 319 b), lands, meadows, pastures, woods, commons, advowsons appendant (5 Rep. 11 b.), villains regardant, courts baron, and perqui-

sites thereof, that are in truth at the time of the grant parcel of the manor. But nothing that in truth is not parcel of the manor, albeit it be so reputed, will pass by the grant of the manor; and therefore if one have a manor, and after purchase the law day (*i.e.*, the Leet; see *ante*, LAW DAY), or a warren to it, and then he grant away the manor, hereby the law day or the warren will not pass (Dy. 30 b, pl. 209). And yet if by union time out of mind [or for a short period] they have gotten a reputation of appendancy, perhaps by the grant of the manor *cum pertinentiis* these things may pass (see Plowd. 168 a). By the grant of a manor also divers towns (Co. Litt. 5 a) [the lands in divers towns] may pass. An honor also may pass by this name; and so also may a castle or a hundred. And one manor also, that is parcel of another manor, may pass by the grant of that manor whereof it is parcel, [*viz.*, the seignory of the inferior manor] (*Marshe and Smith's Case*, 1 Leon. 26); "Shep. Touch. 92. S. C., Cro. El. 38. See also Co. Litt. 58 a; *Darell v. Wybarne*, Dy. 207 a, pl. 14. The freehold interest in the copyhold passes; *Delacherois v. Delacherois*, 11 H. L. C. 62; S. C. (with the Irish Judgments), 4 N. R. 501.

If a man creates a particular estate in the whole or part of a manor, the reversion remains parcel of, and passes by a grant of the manor; but if he creates a particular estate of freehold in the whole manor except Blackacre, and during the continuance of that estate grants the manor, Blackacre does not pass: *secus* if the particular estate be for years (Co. Litt. 324 b, 325 a). Accordingly, where a prior and convent leased the site and all the demesnes of a manor for life at a rent, *held*, that the rent and reversion of the demesnes passed by a grant of the manor; *Aprice v. Rogers*, Dyer, 233 a, pl. 10 and 11; so did trees excepted from a lease for years (*secus* a lease for life). *Ives' Case*, 5 Rep. 11 a.

Rent may be parcel of a manor by prescription; 22 Ass. pl. 53; 31 Ass. pl. 23.

A carucate may pass by the name of a manor; 27 H. 6, 2, pl. 14.

By the grant of a manor with the appurtenances a castle or cantred (*i.e.*, hundred) 26 Ass. pl. 54, and land bought in and occupied with the manor; *Symonds v. Green*, Cro. Car. 308, may pass.

Manor may pass by the word "messuage," "land," "priory," "chauntry," "Knight's fee"; see the authorities cited in argument *Rex v. Stafferton*, 1 Buls. 54; by "castle," Co. Litt. 5 a.

As to the conveyance of part of a manor, see Co. Litt. 324 a, 325 b; *Marshe & Smith's Case*, 1 Leon. 26; S. C., 4 Cro. El. 38, sub nom. *Morris v. Smith*; *Finch's Case*, 6 Rep. 62 b. The cases are collected in 2 Bythewood, by Sweet (3rd ed.), 551, &c., 6 *id.* 589 *et seq.*

By a grant of a "reputed manor," the freehold interest in the waste does not pass, nor does any specific tenement of the grantor; *Doe d. Clayton v. Williams*, 11 M. & W. 808. Reputed
manor.

By "manor" a reputed manor may pass in a deed, but not in a fine or recovery; *Mallet v. Mallet*, Cro. Eliz. 524, 707; *Finch's Case*, 6 Rep. at p. 64 a; but see *Treswallen v. Penhules*, 2 Rol. Rep. 66.

If the lord conveys away the fee simple of a copyhold tenement, the copyholder can convey his interest by a common law assurance. *Phillips v. Ball*, 6 C. B. N. S. 811.

See generally as to manors, Com. Dig. tit. *Copyhold*, Q.; 15 Vin. Abr. s. v. *Manor*.

Manurable.—See *ante*, s. v. DEMESNE, note (b).

Market.—A man can only have a market or fair (which is a great market held once or twice a year), by grant from the Crown or prescription. The owner of a fair or market has, without any express grant, the right to hold a Court of Record, called a Court of Piepoudre (see, as to this Court, 4th Instit. 272), as incident thereto; but he has no right to take tolls without express grant or prescription; 2nd Instit. 220, 221; *Heddy v. Wellhouse*, Moor, 474.

A market may be granted so as not to be confined by metes and bounds; *Att.-General v. Horner*, 14 Q. B. D. 245. As to disturbance of market, see the cases collected in *Goldsmid v. Great Eastern Rail. Co.*, 25 Ch. D. 511; S. C., 9 App. Cas. 928.

See 15 Vin. Abr. *Market*; and *post*, STALLAGE, TOLLS.

Meadow.—Land passes by the grant of a meadow; Co. Litt. 4 b. It is said (Woodfall, Landlord and Tenant), that

meadow means ancient meadow ^{*}only; *Tresham v. Lambe*, 2 Brownl. 46, but query; for the case applies to the Stat. of Gloucester only.

Mease ; Mese.—Idem quod messuagium; Spelm. Gloss. s. v.

Measures of Land (e).—(1) *Domesday Measures.*—Very little is known as to the Domesday measures. Mr. Eytton, in his “Key to Domesday (Dorset),” distinguishes between the geld hide, *i.e.* the hide used as the unit of taxation, and the hido used as a land measure, which was also called a carucate. He says that a geld hide was sub-divided as follows:—

Hide.	Virgate.	Ferndel.	Acre.
1	4	16	48
	1	4	12
		1	3

where the acre (“acra ad gheldum”) was about five statute acres.

Mr. Eytton is of opinion that the linear measures were:—

Feet.	Yards.	Virga or pertica.	Acra.	Quarentenæ.	Leuca or Lengre or Leunæ.
16½	5½	1			
66	22	4	*1		
660	220	40	10	1	
7920	2640	480	120	12	1

(e) “In the simpler stages of society, land was admeasured more by quality than by extent. The fields capable of being tilled by one plough in the course of one year constituted the *Carrucate* or *Ploughland*. This mode of calculation, though rude, was equitable. It defined the value of the donation better than an enumeration of superficial acres. The term of measurement designated the capability and worth of the land which it comprised. In various parts of England therefore, the carrucate differed exceedingly in quantity. The same denomination was applied to 60, 80, 100, 112, 120, and 150 acres;” *Palgrave, Eng Commonwealth*, Vol. 2, p. cccclvii. ; see also Mr. Elton’s remarks, *Tenures of Kent*, 123 *sqq.* And see Kemble, *Saxons in England*, Vol. I., Appendix B., on the Hide ; and *England under the Normans*, by J. F. Morgan, Ch. II.

and that the areal measures were :—

Square yards.	Square perches.	Acres.	Quarentenæ.	Leucæ.
30½	1			
4840	160	1		
48400	1600	10	1	
580800	19200	120	12	1

It should be observed that the acra (linear) was the same as the modern chain, and that the acra and quarentena (areal) were respectively equal to 10 square acra or quarentenæ (linear).

Professor Pearson (England during the Early and Middle Ages, 651) comes to the conclusion that there were two hides, the first or "Bede's hide," *i.e.*, before Domesday, of from 25 to 30 acres, which, he says, is conceivably the Domesday virgate; the other, which was used in later times, of from 100 to 120 acres.

See also as to the measurement of land in Domesday, Ellis, *Introd. Domesd.*, Vol. I., pp. 145 *et seq.*

(2) *Mediæval Measures*.—As was stated above, the shots in Ridge, *selio*, the common field were divided into strips called "ridges," or *selio*; see *ante*, COMMON FIELDS. A ridge was of uncertain size (Co. Litt. 5 b), for it appears to have been as much land as could be ploughed by a team of eight oxen in a day, a quantity which necessarily varied according to the nature of the soil; but the normal size was 40 perches in length by 4 perches in width, *i.e.*, an acre. It sometimes happened that contiguous ridges and the balk between them were thrown into one.

A source of uncertainty arises from the common confusion between statute and customary acres; but it appears probable, though we can adduce no definite authority for the statement, that a ridge was a customary acre. See, on all these questions, Seeböhm, *Eng. Vill. Comm. passim*.

A hide, or carucate, or ploughland, was of uncertain extent; Hide, carucate, Co. Litt. 69 a. According to Spelman (Gloss. s. v. *Hida*), it was ploughland. the extent that could be ploughed by a team in the course of a year; so that, assuming that the owner of each yardland con-

tributed two oxen to the common team, its normal size would be $30 \times 8 = 120$ acres. In the Register of Worcester Priory above mentioned, the carucate appears to have contained 6 virgates = 180 acres: see Hale's *Introductio*. pp. xix., xlv. See *ante*, CARUCATE, HIDE; *post*, PLOUGHLAND.

Virgate,
yardland.

The normal yardland or virgate consisted of 30 ridges, or 30 acres; but its size varied in different places; Co. Litt. 5 a, 69 a; Spelm. Gloss. s. v. *Virgata terræ*. In the Register of Worcester Priory (Camd. Soc. 1865, ed. Hale), fol. 25 b, among the inquiries directed to be made of the particulars of manors is one—"Quot acra faciunt virgatam secundum diversa loca." See *ib.* fol. 36 a, 48 a, 62 a, and the Editor's notes, showing that the normal virgate, in the manors of the Priory, contained 30 acres, but that the size was not always the same even in the lands of the same manor.

Fardella terræ was the fourth part of a virgate; *fardingdeale* was the fourth of an acre, *i.e.*, a rood; and sometimes the 160th part of an acre, *i.e.*, a square perch. See Spelm. Gloss. s. v. *Fardella*, Eyton, Key Domesd. 14 n.

Measurement
by divisions of
a pound
sterling or
mark.

There was another manner of measurement (derived from the subdivisions of a pound into shillings and pence), in which *Librata terræ* was 240 acres, *solidata terræ*, 12 acres, *denariata terræ*, 1 acre, *obolata terræ*, $\frac{1}{2}$ an acre, and *quarantata terræ*, $\frac{1}{4}$ of an acre. Sometimes, the form of measurement was derived from the division of a mark, 160 pence; according to this method, *denariata terræ* would be a square perch, *obolus terræ* and *quadrans terræ*, the $\frac{1}{2}$ and $\frac{1}{4}$ of a square perch respectively; Spelm. Gloss. s. vv. *Fardella*, *Obolata*. Coke, on the other hand, says that "by the grant *de centum libratiss terræ*, or 50 *libratiss terræ*, or *centum solidatiss terræ*, &c., land of that value passeth;" Co. Litt. 5 b. See on this mode of admeasurement, Palgrave, Eng. Commonwealth, I., 93 *seq.*

(3) *Customary measures*.—Formerly, the size of the perch, and therefore that of the customary acre, which generally contained 160 perches, varied in different parts of England. This may possibly be explained by supposing that the acre was taken of such a size as to be a day's ploughing with a team of oxen: see Spelm. Gloss. s. vv. *Jornale*, *Jurnale*.

Sometimes there were two or more customary acres in use in the same place for different purposes.

The following list of customary measures is taken from the appendix to the 2nd Report of the Commission on Weights and Measures, (814) Parliamentary Papers for 1820, Vol. VII.

Scotch Acre : $6,150\frac{4}{10}$ square yards.

Irish Acre : 7,840 sq. yds. = 160 perches (Irish) of 7 yards square instead of $5\frac{1}{2}$.

THE ACRE, in different parts of England, was as follows, viz., in—

Bedfordshire : sometimes 2 roods.

Cheshire : in some places 10,240 sq. yds.

Cornwall : sometimes one of the Welsh acres of 5,760 sq. yds.

Dorsetshire : generally 134 perches.

Hampshire : from 107 to 120 perches, but sometimes 180.

Herefordshire : two thirds of a statute acre.

of hops, about half an acre, containing 1,000 plants ;

of wood, $1\frac{2}{3}$ statute acres or 256 perches.

Leicestershire : $2308\frac{3}{4}$ sq. yds.

Lincolnshire : 5 roods, particularly for copyhold land.

Staffordshire : nearly $2\frac{1}{4}$ acres.

Sussex : 107, 110, 120, 130, or 212 perches.

short acre, 100 or 120 perches.

forest acre, 180 perches.

Westmoreland : 6,760 sq. yds. or 160 perches of $6\frac{1}{2}$ square ; in some places the Irish acre was used.

Worcestershire : hop acre, 1,000 stocks or 90 perches ; sometimes 132 or 141 perches.

N. Wales : *Erw*, or true acre, 4,320 sq. yds ; *Stang*, or customary acre, 3,240 sq. yds., making $5\frac{1}{2}$ *Llathen* = 160 perches (Welsh), of $4\frac{1}{2}$ yards square, called *paladr* ; 8 acres making an oxland, and 8 of these a ploughland in Pembrokeshire.

ACRE sometimes denoted a measure of the length following, i.e., in—

Bedfordshire :
Buckinghamshire : $\left\{ \begin{array}{l} \text{a chain of 4 poles or 22 yards. This} \\ \text{is the same as the Domesday} \\ \text{"Acre," ante, p. 597.} \end{array} \right.$

Derbyshire : 4 roods each of 7 or 8 yards.

Yorkshire : 28 yards.

LUG OR LUGG :—

Dorsetshire : of land, 15 feet, 1 inch, called also a *goad*, and used instead of a pole of $16\frac{1}{2}$ feet.

Herefordshire : of coppice wood, 49 sq. yds.

Hertfordshire : 20 feet.

Wiltshire : a pole or rod of 15, $16\frac{1}{2}$, or 18 feet.

OXLAND.—*Glamorganshire and Pembrokeshire* : 8 customary acres.

PALADR.—*Anglesea* : the perch of $4\frac{1}{2}$ yards square = $20\frac{1}{4}$ sq. yds.

PERCH, ROD, OR POLE.—A measure of length = $5\frac{1}{2}$ yards. In many counties a perch of 8 yards was used in fencing. The forest pole was 7 yards ; in Sherwood forest 25 feet. A coppice pole was 6 yards.

PERCH.—*Berkshire* : sometimes 18 feet for rough work.

Devonshire : of stone-work, $16\frac{1}{2}$ feet in length, 1 inch in height, and 22 inches in thickness ; of cob-work, 18 feet in length, 1 in height, and 2 in thickness.

Herefordshire : of fencing, 7 yards in length ; of walling, $5\frac{1}{2}$.

Hertfordshire : sometimes 20 feet ; sometimes called a lug.

Lancashire : $5\frac{1}{2}$, 6, $6\frac{1}{2}$, 7, $7\frac{1}{2}$ or 8 yards in different parts of the country.

Leicestershire : of hedging 8 yards ; sometimes 8 yards square for land.

Oxfordshire : of draining, 6 yards.

Westmoreland : near Lancashire, 7 yards.

Guernsey : 7 yds. sq. for land measure, making $1\frac{3}{5}$ perches.

Jersey : $7\frac{1}{3}$ yards square = 22 feet square = $\frac{1}{8}$ of an acre.

S. Wales : of land (1) sometimes 9 feet square, 160 making one stangell ; 4 stangells 1 erw of 5,760 sq. yds.

(2) Sometimes $10\frac{1}{2}$ feet square, called a quart, or quarter of a Llath, 40 of which made a stangell, whence the erw was 7,840 sq. yds., equal to the Irish acre.

(8) Sometimes 11 feet, called bat or eglwys haw, making an erw of 9,384 sq. yds.; or in Glamorgan-shire $\frac{1}{4}$ more=11,261, reckoning 48 to the rood or $\frac{1}{4}$ stang (*f*).

(4) Sometimes $11\frac{1}{2}$ feet, called a Llath, 48 making a quarter cyvar, and 4 cyvars an erw of 11,776 yards (*f*).

(5) Sometimes 12 feet, called a quart or quarter Llath, giving an erw of 10,240 sq. yds., equal to the Staffordshire acre.

PLOUGHLAND.—*Wales* : 8 Oxlands = 64 customary acres.

ROOD OF LAND= $\frac{1}{4}$ acre=40 perches=1,210 sq. yds., but it was often provincially used for rod, or a measure approaching to it.

Cheshire : of hedging, 8 yards; land, 8 yards square.

Cumberland : 7 yards.

Derbyshire : of bark was a pile 7 yards in length; of draining or fencing 7 or 8 yards; of digging, about Matlock, "7 square yards;" perhaps, rather, 7 yards square.

Durham : of wall building, 7 yards.

Northumberland : 7 yards.

Shropshire : of hedging, 8 yards; of digging, 8 yards square.

Warwickshire : of fencing, sometimes a perch, or $5\frac{1}{2}$ yards.

Westmoreland : of slating, $6\frac{1}{2}$ yards square=42 $\frac{1}{2}$ sq. yds.

Yorkshire : in the moorlands, of fencing, 7 yards.

Wales : of ditching, draining, and hedging, 8 yards.

BUT.—In S. Wales, a perch of 11 feet square.

ERW.—S. Wales : a measure of land varying from a little more than 1 to more than 2 acres, containing 4 stangell or cyvar, each containing 160 perches.

LEAP.—In Wales, formerly, 6 feet 9 inches.

LINK= $\frac{1}{100}$ of a Chain= $7\frac{9}{100}$ inches.

LLATH.—S. Wales : sometimes 21 feet square, 160 making an erw; sometimes $11\frac{1}{2}$ feet square, 768, to the erw; some-

times 24 feet square, 160 to the *erw*. In Anglesey, $5\frac{1}{2}$ *llathen* made an acre of 3,240 sq. yds., each containing 30 perches of $13\frac{1}{2}$ feet square.

(4) *Modern measures*.—Under the provisions of 5 Geo. 4, c. 74, ss. 1, 2, repealed and re-enacted by 41 & 42 Vict. c. 49, the standard yard is defined, and the lineal and superficial measures of land are connected in the manner shown in the following tables:—

Linear Measures.

Yards.	Rod, pole, or perches.	Chain.	Furlong.	Mile.
$5\frac{1}{2}$	1			
22	4	1		
220	40	10	1	
1760	320	80	8	1

Superficial Measures.

Square yards.	Square perches.	Square chains.	Rood.	Acro.
$30\frac{1}{4}$	1			
484	16	1		
1210	40	$2\frac{1}{2}$	1	
4840	160	10	4	1

Messuage:—(See also **HOUSE**), is commonly used to denote a dwelling-house, but properly means a house with a small piece of ground attached to it; Co. Litt. 5 b, 56 b; Shep. Touch. 94, and cases there cited; Plowd. 85 a; 168; 4 Cruise, Dig. tit. 32, Ch. 21, s. 40; Spelm. Gloss. s. v. *mes-suagium*; it does not necessarily imply more than a dwelling-house (*g*); *Fenn v. Grafton*, 2 Bing. N. C. 617; Spelman,

Chambers,

(*g*) Which may consist of part only of a house, 3rd Instit. 65; *Fenn v. Grafton*, *ubi supra*; *Evans and Finch's Case*, Cro. Car. 473; S. C., W. Jones, 391 (a set of chambers in the Temple), cited per Jessel, M.R., *Yorkshire Insurance Co. v. Clayton*, 8 Q. B. D. 423.

ubi supra. It may mean a chamber, upper or lower, in which any person dwells; 3rd Instit. 65; or a manor, farm, chapel (13 Ass. pl. 2), or hospital; Shep. Touch. 94. Even without the words "with the appurtenances," a garden may pass; Co. Litt. 5 b, 56 b; *Doe d. Norton v. Webster*, 12 Ad. & El. 442 (where there was a description of the parcels by reference to the occupation, and the garden was in fact occupied by the tenant of the house); *contra*, Moore, 24, pl. 82; Keilw. 57, pl. 7; see *Hill v. Grange*, Plowd. 164. See *Fenn v. Grafton*, 2 Bing. N. C. 617; *Smith v. Martin*, 2 Wms. Saund. 400 (vol. 2, p. 802, ed. 1871), and notes there, as to whether the words "with the appurtenances" were, in deeds before 1882, of any use to convey more than would pass without them.

Mill: — Includes the stones, tackling, and implements necessary for the working thereof; 14 H. 8, 25 B. *Place v. Fagg*, 4 Man. & Ry. 277; Shep. Touch. 90.

A mill will pass by the name of a messuage; *Hill v. Grange*, Plowd. 170 a. The lord of a manor may prescribe that all the resiants [residents] and inhabitants within his manor must grind their corn at his mill. Such a right may also arise from tenure or by custom; *Hix v. Gardiner*, 2 Bulst. 195; see 15 Viner, ab. *Mill*. The corn must be grown within the manor; *Cort v. Birkbeck*, 1 Dougl. 218. See also *Drakes v. Wiglesworth*, Willes, 654; *Harbin v. Greene*, Holt 189; *Coryton v. Lathby*, 2 Wms. Saund. 112; S. C., 1 Vent. 167; *Chapman v. Flexman*, 2 Vent. 286. See Register of Worcester Priory (Camd. Soc.), fol. 32 a, and the Editor's note, p. lxiii.; Domesd. of St. Paul's (Camd. Soc.), p. cxxx.; *ib.* p. 172, where "*multura molendini*" and "*telonium molendini*" are mentioned.

See also Tomlins, Law Dict. *Secta ad Molendinum*; Eyton, Key to Domesd. 41.

Mines and Minerals: pass by the name of land (in a conveyance of the freehold); Shep. Touch. 90; see *Townley v. Gibson*, 2 T. R. 701. A lease of land passes to the lessee the right to work open mines, but not to open unopened mines;

and if the words are "land and mines," and no mines are open, he may open and work unopened mines; *Saunder's Case*, 5 Rep. 12 a; but if any mines are open, he may work them only; *Astry v. Ballard*, 2 Lex. 185; S. C., T. Jo. 71; see Co. Litt. 54 b. As to the construction of a power to lease "land and mines," see *Clegg v. Rowland*, L. R. 2 Eq. at p. 165.

By a grant of mines the land itself will pass; but formerly, if there was no livery, only a right to work them passed; Co. Litt. 6 a.

"Mines" do not include open cuttings; *Bell v. Wilson*, L. R. 1 Ch. 303.

Minerals include everything that can be got from underneath the surface of the earth for the purpose of profit; *Hert v. Gill*, L. R. 7 Ch. at 712; *Att.-Gen. v. Tomline*, 5 Ch. D. at 762.

Mines and minerals "lying and being within or under" the lands, include everything that can be got by quarrying as well as by mining; *Midland Rail. v. Checkley*, L. R. 4 Eq. 25. But the context may show that they are to be got by underground workings only; *Darvill v. Roper*, 3 Drew. 294; *Bell v. Wilson*, L. R. 1 Ch. 303.

"Quarries, delfs of flagstone, or slate," mean open workings, and things got by such working; *Att.-Gen. of Isle of Man v. Mylchreest*, 4 App. Cas. 307.

Where an agreement for a lease contained a reservation to the lessor of "all mines and minerals, sand, quarries of stone, brick earth, and gravel pits," and it was proved that the custom of the district was that the tenant might remove and sell the flints which came to the surface in the ordinary course of ploughing, it was held that the reservation must be construed, having regard to the custom, as not including such flints; *Tucker v. Linger*, 21 Ch. D. 18; 8 App. Cas. 508.

See the primary meanings of "mines" and "minerals" distinguished *per* Kay, J., *Midland Rail. Co. v. Hawnchwood, &c., Co.*, 20 Ch. D. 552, where it was held that the word "mines" in the 77th section of the Railways Clauses Act, 1845, includes minerals, whether got by underground or by open workings.

Next Presentation.—See ADVOWSON. As to what words pass it, see 2 Vin. Ab. *Advowson* (B).

Noka—a half virgate, generally $7\frac{1}{2}$ acres. Register of Worc. Priory (Camd. Soc.), fol. 7, and notes, p. xxxvii.; and see *ib.*, fol. 41 b., 48 a, 56 a, and notes, p. lxxv.

Nummata Terræ is the same as *Denariata terræ*; Spelm. Gloss. s. v. See *ante*, MEASURES OF LAND.

Offerings: Oblations: Obventions.—Explained in 1 Phillimore, Eccl. Law (Ed. 1873), p. 1596, citing Com. Dig. tit. "*Prohibition*," G. 11; Ayliffe's Parergon, 11. See also 16 Vin. Ab. 77, tit. *Offerings*.

Obolata Terræ.—Half an acre, or half a square perch. Spelm. Gloss. s. vv. *Fardella*; *Obolata*. See *ante*, MEASURES OF LAND.

Occupation "is a word of art, and signifieth a putting out of a man's freehold in time of war; and it is all one with a disseisin in time of peace. . . . But *occupatio* is also applied to the possession, be it lawful or unlawful"; Co. Litt. 249 b.

The word "*occupationes*" is sometimes used for purpresures, intrusions, and usurpations; 2nd Instit. 272. (See Spelm. Gloss. s. v. *Occupatum*.)

In the conveyance to B. in fee of a cottage in which A. then resided, there was a proviso that it should be lawful for A. "to live in, inhabit, dwell in, and occupy the said cottage with the appurtenances, as he heretofore has done and now does for and during the term of his natural life;" *held*, that an estate for life was reserved to A.; Kenyon, C. J., said: "If this question had depended on the first words of the proviso, I should have thought they would have been satisfied by determining that only a liberty to inhabit the cottage was given to A.; but the word 'occupy' carries the interest reserved still further, and shows that the whole estate was intended to be reserved to him;" *Rex v. Inhabitants of Easington*, 4 T. R. 181. .

As to a devise of "the use and occupation," see 1 Jarman on Wills (4th ed.), 798.

Oxgang.—See **BOVATE**.

Pannage or Pawnage, Pannagium.—The right of putting swine into woods to feed on the acorns and mast of beech trees, which is a species of common of pasture; 4th Instit. 308; Williams on Commons, 168, 189 (*h*). It is also used for the payment for the right of pannage; Spelm. Gloss. s. v. *Pannagium*. See the meanings of the word discussed, Moore, 46, pl. 139. *Pannagium* is also used (by corruption for *pavagium*,) for the toll for paving a city causeway or way; *Webb's Case*, 8 Rep. at 47 a. See the chapter (12) on Pannage, in Manwood's Forest Law. *Chilton v. Corporation of London*, 7 Ch. D. 562.

Park, Parcus.—A great quantity of ground inclosed, privileged for wild beasts of chase by prescription or the King's grant. A forest and a chase are not, and a park must be inclosed; Co. Litt. 233 a. To a lawful park three things are required: (1) a liberty, either by grant or prescription; (2) Inclosure by pale, wall, or hedge; (3) beasts savage of the park; 2nd Instit. 199.

A park may be parcel of a manor by grant or prescription. *The Queen v. Buccleugh*, 6 Mod. at p. 151.

See 16 Vinen. Ab., s. v.

Parcus is also used for Pound or Pinfold; Spelm. Gloss, s. v. *Parcus*.

Particata Terræ.—A rood; Spelm. Gloss. s. v.

Party-wall may be used in four different senses:—

First.—A wall of which the two adjoining owners are tenants in common; *Wiltshire v. Sidford*, 1 Man. & Ry. 404; *Cubitt v. Porter*, 8 B. & C. 257; *Stedman v. Smith*, 8 E. & B. 1; *Standard Bank of British S. America v. Stokes*, 9 Ch. D. 68;

(*h*) According to Britton, fol. 143 b (vol. i., liv. 2, ch. 24, p. 371, ed. Nichols), cited *post*, p. 615, s. v. **PASTURUM**, "pesson" or pannage is a species of pasture. In this Britton appears to follow Bracton, lib. 4, c. 38; and Fleta, lib. 4, c. 19, agrees.

Watson v. Gray, 14 Ch. D. 192. This is the most common and primary meaning of the term; *per Fry, J., Watson v. Gray*, 14 Ch. D. 192.

Second.—A wall divided longitudinally into two strips, one belonging to each of the neighbouring owners. In this case the owners are not tenants in common, even if the wall was erected at their joint expense; *Matts v. Hawkins*, 5 Taunt. 20: but where there has been a common user of the wall erected at the common expense, that, in the absence of any other evidence, is sufficient evidence for a jury to find that the wall is held by the two parties as tenants in common; *Cubitt v. Porter*, 8 B. & C. 257; *Standard Bank of British S. America v. Stokes*, 9 Ch. D. 68.

Third.—A wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements. The term is so used in the Metropolitan Building Act, 18 & 19 Vict. c. 122, s. 3. *Knight v. Pursell*, 11 Ch. D. 412. Such a wall may be a party-wall for some part of its height and above that height the separate property of one of the adjoining owners (*Weston v. Arnold*, L. R. 8 Ch. 1084); and in the same way such a wall may be laterally a party wall for such distance as it is used by both owners and no further; *Knight v. Pursell*, 11 Ch. D. 412.

Fourth.—A wall divided longitudinally into two moieties, each moiety being subject to a cross-easement in favour of the owner of the other moiety. This meaning is suggested in the note to *Wiltshire v. Sidford*, 1 Man. & Ry. 404.

The cases are collected in 5 Fisher, Dig. 990 *et seq.*, and see Hunt on Boundaries, chap. 5:

Pasture.—That the soil passes by a grant of “pastures,” and as to the difference between *pastura* and *pascuum*, see Co. Litt. 4 b. For another distinction between *Pascuum* and *Pastura*, see Lindewode, Prov. Angl. lib. 3, tit. *de Decimis*, c. quoniam, cited Spelm. Gloss. s. v. *Pastura*.

Where the right conveyed is simply a *profit à prendre*, it is an incorporeal hereditament, and cannot be granted without deed; but where the land itself was to pass, the conveyance

might formerly be by feoffment, or, as the old books put it, "by parol," *i.e.*, livery of seisin: see Hall on Profits a Prendre, Ch. 3, pp. 18 and 99.

A person entitled to the right of common of pasture, or to a several pasture, can only take it by the mouths of his cattle; Bract. lib. 4, c. 88; he must not meddle with the soil, even to improve the property; 1 Roll. Ab. 406, pl. 10: *Harcourt v. Spicer*, 12 H. 8, 2; 13 H. 8, 15: *Sambourne v. Harilo*, Bridg. 9.

Common of Pasture is one of the class of rights called profits a prendre, and may be claimed by prescription or grant, and either in a *que estate* or in gross, but not (except by copyholders; see *infra*) by custom.

If claimed in a *que estate* (*i.e.*, as annexed to the estate of a tenant in fee simple, and exercisable either by him or by persons claiming estates derived from his (*i*)) (*Gateward's Case*, 6 Rep. 59 b; *Grimstead v. Marlowe*, 4 T. R. 717: *Att.-Gen. v. Gauntlett*, 3 Y. & Jer. 93; Co. Litt. 120 b; 2 Bl. Comm. 264, 265) it may be either (1) appendant, or (2) appurtenant (*j*).

(1) *Common appendant* "is of common right (see this explained *Tyrringham's Case*, 4 Rep. 36 a; S. C., Tud. L. C., R. P.), and therefore a man need not prescribe for it;" Co. Litt. 122 a. This seems to be inconsistent with the doctrine in Co. Litt. 121 b, that appendants are ever by prescription; "but they may be reconciled; for as appendancy cannot be without prescription, the former always implies the latter; and therefore if one pleads common appendant, it is unnecessary to add the usual form of prescribing"; Hargrave, note to Co. Litt. 122 a. And see remarks in Wms. R. P., Append. C.; *Hayes v. Bridges*, Ridg. L. & S. 410.

In *Dunraven v. Llewellyn* (*k*), 15 Q. B. 791 (at p. 810), it is

(s) But by the Prescription Act (2 & 3 Wm. 4, c. 71), s. 5, it is no longer necessary to claim in the name or right of the owner of the fee. See Wms. Comm. 16, 174.

(j) In the old books the word "pertinens" is often used, and appendant and appurtenant are not always distinguished; see Co. Litt. 121 b; Vin. Abr. Common, C. and M.: *Musgrave v. Cave*, Willes, 319; and *Tyrringham's Case*, 4 Rep. at 38 a.

(k) See this case discussed in Williams on Real P., Appendix C.

said that not every tenant of a manor has it of common right, but "only certain tenants have it—not by prescription, but as a right by common law incident to the grant" (2 Inst. 85)) and "it belongs only to each grantee before the statute of *Quia Emptores* of arable land by virtue of his individual grant, and as incident thereto." . . . And it is limited to commonable cattle, "whereas the right by grant or prescription" (meaning common appurtenant) "has no such limits, and depends on the will of the grantor."

Mr. Digby, Hist. R. P. ch. iii. s. 17 (2), thinks that the name "common land" is a trace of the period when the commoners were regarded as having rights of property over the soil itself, instead of simply *jura in alieno solo*. He describes common appendant as being the rights of pasturage on the wastes of a manor which were incident to all freehold land held of that manor.

For definitions of common appendant, see *Tyrringham's Case*, 4 Rep. 86 a (S. C., Tud. L. C., R. P.): *Mellor v. Spate-man*, 1 Wms. Saund. 346 d, note l, citing Com. Dig. *Common*, B.: *Bennett v. Reeve*, Willes, 227; 2 Instit. 85 (these authorities are set out in Appendix C. to Wms. on Real P.): per Lord Hatherley, C., *Warrick v. Queen's College*, L. R. 6 Ch. at p. 722; Hall, Prof. a Pr. 244 sqq. From these authors it appears that it was an incident inseparably annexed at common law by implication on every ancient conveyance of arable land to a free tenant to hold of the feoffor: and can be claimed only in respect of land which then was *arable* (*Tyrringham's Case*, and *Carr v. Lambert*, L. R. 1 Ex. 168); for commonable beasts only (*i.e.*, horses, oxen, cows, and sheep); and is limited by levancy and couchancy (see *Bennett v. Reeve*, Willes, 227). If the right claimed does not conform to these conditions, it must be appurtenant. Fitzherbert on Survey, c. 6.

Being incident to the creation of a tenure, common appendant must have arisen before *Quia Emptores* (Vin. Abr., *Common*, C.; 1 Roll. Abr., *Common*, 396, pl. 4; Com. Dig., *Common*, B.). It must have been created before the time of legal memory; Hall, Prof. a Pr. 248, citing Y. B. 26 Hen. VIII., T. T. 4, pl. 15; 1 Roll. Ab. 396; which follows from the

doctrine laid down by Coke (Co. Litt. 122 a), that appendancy implies prescription. So it cannot be claimed in respect of land approved within legal memory, 5 Ass. 8, pl. 2.

A consideration of the history of the ancient land system of England, and of the connexion between the village community or mark and the manor (as to which see *ante*, s. v. MANOR, and *post*, s. v. TOWNSHIP) points to the conclusion that the origin of common appendant is to be traced to a period anterior to the Norman Conquest, when the waste lands of each vill or township were depastured by the community of cultivators dwelling therein, whose rights were recognized, or, at least, whose enjoyment was not interfered with, at the Norman Conquest (*l*), whatever may have been the changes in the ownership and tenure of land introduced at that period, and notwithstanding the fact that the waste lands came to be regarded as the freehold of the lord.

In support of the conclusion, that the origin of the right is to be traced to the constitution of the old English Township, see the evidence and authorities collected in Williams on Commons, Lect. 4 (*m*), and Nasse, Agricultural Community (trans. Ouvry, p. 60). See also the remarks on the history of waste lands and the extracts from Bracton given in Digby's History of the Law of Real Property (3rd ed., at pp. 18, 27, 44, 150, 161, 166), and *ante*, MANOR, *post*, TOWNSHIP.

Mr. Digby (p. 18) cites authorities tending to show that in the period before the Conquest the waste lands were regarded as public lands, and the rights of common of each village community as being something more than mere *jura in alieno solo*. He refers to Kémble's Codex Diplom. cclxxvi. (grant of a *villa* "et communionem marisci quæ ad illam villam antiquitus

(*l*) See Digby, Hist. R. P., ch. i. sect. 2, and Palgrave, Eng. Commonwealth, vol. i., pp. 54, 57, 65, 79, 83, 239, and 584; Palgrave, History of Normandy and Eng., vol. iii., p. 599; Stubbs, Const. Hist., vol. i., ch. 9, p. 273; Reeves, Hist. Eng. Law, vol. i. ch. 2, notes by Finlason, citing Hale, Hist. Comm. Law, as to the retention of the Anglo-Saxon customary law.

(*m*) Viz. (*inter alia*), the forms of writs relating to common of pasture in Bracton, lib. 4, c. 38, p. 224; c. 39, p. 229: 2 Fitzherb. N. B., 125, 179 (see also the writs in Glanv., lib. 12, c. 14; lib. 13, c. 37); Y. B. 11 Hen. 7, 14 a; 21 Hen. 7, 40 b; Viñ. Abr., Common, K. 9 to 14; Co. Litt. 110 b; 2 Bl. Comm. ch. 3, p. 33; *Ellard v. Hill*, 1 Sid. 226; *Pate v. Brownlow*, 1 Keb. 876.

cum recto pertinebat"); *ib.*, colxxxviii.; and *ib.*, Introd. i. p. xl.

In the Domesday Survey, "Pastura ad pecuniam" (= *pecus*, cattle), "*villa*" is a common entry in some counties; Ellis, Introd. Domesd. vol. i. p. liv.

So in the Domesd. of St. Paul's (Camd. Soc.), circa A.D. 1122, we find (p. 85) an entry:—" *Villata* solvit regi . . . ab antiquo xvi. d. pro communitate pastoragii." And in the same work there is mentioned an entry (see Introd. and notes, pp. lxx., cxxii.) of "pastura communis ad *Parochiam*."

The reader is referred to the Hundred Rolls (temp. Hen. III., Ed. I.) for further evidence as to the relation of the vill to the common pasture; see Rotul. Hundred. (Record ed.), vol. ii., pp. 420 ("Bercha"), 426 (Olmsted), 484 (Swafham Prior); *ib.* (presentment of a purpresture by W. Talemache on the common pasture); *ib.*, 535 (Gantesden). See *ib.* 496, where the jurors present that a certain "domina Willielma" prevented the men of Stowe from driving their cattle on to the common "quando campus seminatur;" *i.e.*, when the arable common field was sown). At pp. 553, 554, the particulars of the vill of Little Shelford are given. There were three landowners in the vill holding of the king in capite, so that this vill was not in the hands of a single lord. After describing their lands and tenants, &c., the entry goes on: "Dictus dominus R. de F. (one of the three tenants in capite) *et tenentes totius villae* habent unam communem moram continentem vi acras." See *ib.*, 534, for a similar instance (Gameling), and remarks thereon in Nasse, Agric. Comm. 60. (Most of the above entries in the Hund. Rolls are referred to in Nasse, Agric. Community, trans. Ouvry, p. 60, q.v. (n)).

(n) The following are some references to cases as to rights of common in the earlier Year Books: see Y. B. 20 Ed. I. 24; 21 Ed. I. 67, 81, 461; 22 Ed. I. 419, 427, 453, 623; 30 Ed. I. 17, 37, 279, 327, 343; 31 Ed. I. 413; 32 Ed. I. 23, 39, 43, 117, 133, 191, 227, 241, 321; 33 Ed. I. (Hil. & Pasch.), 371, 417, 465, 475, 485, Append. 505; 33 Ed. I. (Mich.), 7, 93, 231 note; 35 Ed. I. 449, 495, 507. (The preceding references are to the edition in the Rolls Series.) 1 Ed. II. 7, 9, 12, 17 (common meadow), 23 (common arable field); 3 Ed. II. 68; 4 Ed. II. 111, 145; 5 Ed. II. 160, 170; 6 Ed. II. 183; 7 Ed. II. 225 (common meadows), 228, 229 (common fields); 8 Ed. II. 261; 10 Ed. II. 314, 327. Cases from the Year B. Ed. III. to Hen. VIII., are collected in the Table of Cases in Woolrych on Commons.

"If common appendant be claimed to a manor, it is appendant to the demesnes, and not to the services," Co. Litt. 122 a, and see *Tyrringham's Case*, 4 Rep. 36, b; S. C., Tudor, L. C. R. P.; see also Y. B. 32 Ed. I., p. 227 (Rolls ed.), (*Malta-lent v. de Romyley*), and Y. B. 4 Ed. II., 111.

Common, whether appendant or appurtenant, passed, even before the Conv. Act, 1881, by a conveyance of the land to which it was appendant or appurtenant; see *ante*, Rule 50, p. 186.

(2) *Common appurtenant* is created by grant or prescription; Cro. Car. 482; *Cowlam v. Slack*, 15 East, 108; Ridg. L. & S. 410. It extends to animals not commonable, as donkeys, goats, swine, and geese; Co. Litt. 122 a; and may be claimed in respect of a house, meadow, or pasture; *Tyrringham's Case*, 4 Rep. at 37 a; (S. C., Tud. L. C., R. P.). As it may commence by grant, it may be presumed to exist after long enjoyment; *Cowlam v. Slack*, 15 East, 108. It may be either for a fixed number of animals, or for animals "*sans nombre*," i.e., levant and couchant (o). See further Williams on Comm., Lect. XII., pp. 168 *sqq.*; Hall, Prof. a Pr. 258 *sqq.*

(3) *Common in Gross*, is claimed under a grant to a man and his heirs, or by prescription of enjoyment by a man and his ancestors, unconnected with the ownership of land; Co. Litt. 122 a; Williams on Comm., 9, 198; Hall, Prof. a Pr. 301. The right may be acquired by a corporation either by grant (Wms. on Comm. 201, citing *The Queen v. The Chamberlains of Alnwick*, 9 A. & E. 444); or by prescription in them and their predecessors (Wms. on Comm. 12, citing *Johnson v. Barnes*, L. R. 7 C. P. 592; 8 C. P. 527); and see *Boteler v. Bristow*, Y. B. 15 Ed. IV., 29, pl. 7 (stated in Hall on Prof. a Pr. 153; and by Lord Blackburn in 7 App. Cas., p. 659); 6 Ed. II., 183.

Inhabitants.

No profit a prendre can be claimed by inhabitants, occupiers, or residents, merely as such; see 1 Wms. Saund. 340 c, note (3), 633 (ed. 1871), note (x). They cannot claim in a *que estate*, for they have no permanent estate (see *English v. Burnell*, 2 Wils. 258), but are mere tenants at will; *Boteler v. Bristow*,

"*Sans nombre*."

(o) That *sans nombre* means levant and couchant in contradistinction to tinted common, *sep per* Willes, C. J., *Bennett v. Reeve*, Willes, at p. 232.

Y. B. 15 Ed. IV. 29; nor can they claim in gross, for they are not incorporated, and therefore cannot take by grant or by prescription (which presupposes a grant; *Addington v. Clode*, 2 W. Bl. 989; *per* Jessel, M.R., *Baylis v. Tyssen Amhurst*, 6 Ch. D. at p. 507); *Gateward's Case*, 6 Rep. 59 b; S. C., sub nom. *Smith v. Gatewood*, Cro. Jac. 152 (see remarks on this case in *Goodman v. Mayor of Saltash*, 7 App. Cas. 633, and see the English translation of Coke corrected, *ib.* p. 660; and Wms. on Comm. 17); *Anon.*, 3 Leon. 202, pl. 254; *Constable v. Nicholson*, 14 C. B. N. S. 230; *Davies v. Williams*, 16 Q. B. 546; *Padwick v. Knight*, 7 Ex. 854; *Att.-Gen. v. Mathias*, 4 K. & J. 579; *Knight v. King*, 20 L. T. N. S. 494.

Nor can a profit a prendre be claimed by custom (except in the case of copyholders, see *infra*); see Hall on Prof. a Prendre, 162 *et seq.*; *Whittier v. Stockman*, 2 Bulst. 86; *Fowler v. Dale*, Cro. El. 362; *Weekly v. Wildman*, 1 Ld. Raym. 405; *Mellor v. Spateman*, 1 Wms. Saund. 348; *Grinstead v. Marlowe*, 4 T. R. 717; *R. v. Churchill*, 4 B. & C. 755; *Blewitt v. Tregonning*, 3 Ad. & E. 554; *Race v. Ward*, 4 E. & B. 702.

So "householders" cannot claim as such by prescription; *Ordway v. Orme*, 1 Bulst. 183; nor by custom; *Selby v. Robinson*, 2 T. R. 758; see Hall, Prof. a Pr. 173.

See *per* Lord Kenyon, C. J., in *Grinstead v. Marlowe*, 4 T. R. 717; and 1 Wms. Saund. 345, note (2) (p. 623, ed. 1871), as to declaring generally on the plaintiff's possession.

But inhabitants may take by grant from the Crown, incorporation being presumed; *Willingale v. Maitland*, L. R. 3 Eq. 103; *Chilton v. London (Corp. of)*, 7 Ch. D. 785; *Lord Rivers v. Adams*, 3 Ex. D. 361.

As to presuming that inhabitants exercise rights of common as claiming through freehold tenants, see *Warrick v. Queen's College*, L. R. 6 Ch. 716.

But the free inhabitants of ancient tenements in a borough may, it seems, have a right of fishery under a presumed trust or condition in their favour in a grant to the corporation of the borough; *Goodman v. Mayor of Saltash*, 7 App. Cas. 633. But, *semble*, in that case the right claimed was held not to be a profit a prendre in alieno solo.

As to presuming a lawful origin in support of long usage, see

Goodman v. Mayor of Saltash, *ubi sup.*; *Warrick v. Queen's College*, L. R. 6 Ch. 716.

It was held in *Dunraven v. Llewellyn*, 15 Q. B. 791, that the *liberi homines* or free tenants of a manor do not form a class so as to let in evidence of reputation in support of rights claimed by them, a view contested by Mr. Joshua Williams (Real P., Appendix C.). Consider the remarks of James, L. J., in *Earl de la Warr v. Miles*, 17 Ch. D. at p. 585.

Non-user.

As to whether common of pasture is lost by abandonment presumed from non-user, see Woolrych on Rights of Common, 154; Bracton, f. 223; Britton, 344; *Anon.*, 3 Leon. 202; Y. B. 13 Hen. VII., 13, pl. 3; Hall on Prof. a Pr. 339; Wingrove Cooke on the Inclosure Acts, 4th ed., pp. 59 foll., citing *Moore v. Rawson*, 3 B. & C. 339, and other cases; see the remark of Howard, J., in Y. B. 35 Ed. I., 449 (Rec. Pub.); and per Lord Selborne, C., "Abandonment is a term which has no legal meaning as to an incorporeal hereditament:" *Neill v. D. of Devonshire*, 8 App. Cas. at pp. 154, 155.

Copyholders claim by custom as to rights of common over the wastes of their lord (*p*); *Foiston v. Crachroode*, 4 Rep. 31 b; *Potter v. North*, 1 Wms. Saund. 346; *Hoskins v. Robins*, 2 Wms. Saund. 320; Wms. on Comm. 17; but they prescribe in his name for common in land belonging to a stranger: 22 H. 6, 51; *Foiston v. Crachroode*, 4 Rep. 31 b; *Roberts v. Young*, Hob. 286; S. C., Browne, 172. A copyholder can claim only for beasts levant and couchant on his tenement, or for some ascertained number; *Morley v. Clifford*, 20 Ch. D. 753.

Stinted
common (*q*).

There appears to be some doubt as to the meaning of stinted common. In 3 Cruise, Dig., tit. xxiii., *Common*, s. 21, it is said to be where the right of common is confined to a particular time of the year. But the term is more commonly used in the sense of the right being limited to a fixed number of beasts, as distinguished from beasts levant and couchant,

(*p*) This is an exception to the rule (see *supra*) that profits a prendre cannot be claimed by custom. But formerly custom and prescription were sometimes confused: see *Fowler v. Dale*, Cro. El. 363; Litt. Ten. s. 170; Hall on Prof. a Pr. 108; Co. Litt. 113 b; 2 Bl. Comm. 263; *Foiston v. Crachroode*, 4 Rep. at 32 a.

(*q*) See Fitzherbert, Survey, c. 4.

Williams on Commons, 156. Sometimes the word "stint" is used for the right itself. Common appurtenant may be stinted by the terms of the original grant, and common appendant may be stinted owing to by-laws to that effect made by the commoners. See examples of stinted commons in *Ellard v. Hill*, 1 Sid. 226; *Morse & Webb's Case*, 18 Rep. 65; *Palmer v. Stone*, 2 Wils. 96; *Hall v. Byron*, 4 Ch. D. 667; *Fox v. Amhurst*, L. R. 20 Eq. at 408; *Austin v. Amhurst*, 7 Ch. D. 689; see the by-law at p. 691. As to by-laws made for regulating commons by inhabitants, see Co. Litt. 110 b; *Warrick v. Queen's College*, L. R. 6 Ch. at p. 727.

Common by reason of vicinage: see Wms. on Comm. 183; Hall, Prof. a Pr. 285 sqq.; 2 Bl. Comm. 33: *Commissioners of Sewers v. Glasse*, L. R. 19 Eq. 134: *Cape v. Scott*, L. R. 9 Q. B. 269.

Common of Shack is the right of common in the arable common fields after harvest; *Corbet's Case*, 5 Rep. 5 a; Williams on Commons, 68.

In Britton, liv. 2, ch. xxiv. (Vol. I., p. 371, ed. Nichols) it is said: "Pasture likewise is a general name for herbage, acorns, mast, and nuts, and for leaves and flowers, and for all things comprised under the name of paunage." In this passage, Britton follows closely his predecessor Bracton (lib. 4, c. 38, fol. 222), and Fleta, lib. 4, c. 19, is to the same effect.

Pastura forinseca, p. intrinseca: See the passage cited by the editor of the Domesd. of St. Paul's at p. cxxiii. (from Book I., Archives of St. Paul's). "Item est in dicto manerio pastura forinseca quae communis est ad parochiam . . . pastura intrinseca, sc. super terram warectam" (i.e., the former is on the common waste of the manor, the latter on the arable common, field when lying fallow). See Fitzherbert, Survey, c. 4.

See also CATTLE-GATE; HERBAGIUM; VESTURA.

Pathway.—See WAY.

Perch.—See *ante*, MEASURES OF LAND. See also Spelm. Gloss. s. v. *Pertica*.

Perquisites.—Profits arising to the Lord from his Court Baron above the yearly revenue, such as fines in respect of

copyholds; Perkins, 20, 21. *Perquisitum* is also used in the sense of purchase. Spelm. Gloss. s. v. *Perquisitum*; Bracton, lib. 2, c. 30, *num.* 3.

Picle,' Pickle, Pightel, Pitle, Pigtle.—A little close; Spelm. Gloss. s. v. *Pictellum*.

Pischary.—See FISHERY.

Ploughland, or Carucate, or Carve.—See *ante*, CARUCATE, HIDE, and MEASURES OF LAND. It is "as much as a plough can till;" Co. Litt. 5 a; which is "not of any certain extent;" Co. Litt. 69 a. It may contain "houses, mills, pasture, meadow, wood, &c.;" Co. Litt. 86 b. Land can be demanded and therefore conveyed by these names. See Spelm. Gloss. s. v. *Carua*: 43 Ed. 3, 27.

Pool:—"Doth consist of water and land, and therefore by the name of pool (stagnum), the water and land shall pass"; Co. Litt. 5 a, 5 b; Plowd. 154, 157.

Porca.—Sometimes used for *selio*, sometimes for balk; see Co. Litt. 5 b: Spelm. Gloss. s. v. *Selio*; Ducange, Gloss. s. v.

Pound.—See Co. Litt. 47 b; *ante*, PARK.

Precariæ or Boonwork.—Special work done by a tenant at the request of his lord, as distinguished from fixed services; Seeborn, 78; Spelm. Gloss. s. v. *Precariæ sicca* are "boon days without allowance of drink;" Domesd. of St. Paul's (Camd. Soc.), notes, p. cxxiv. *Precariæ* is also used in the sense of Benefices (feuds); Palgrave, English Commonwealth, Vol. II., p. ccv.

Prime way.—See WAY.

Purliew "contains such grounds which H. 2, R. 1, or King John added to their ancient forests over other men's grounds, and which were disafforested by force of the Statute of Carta de Foresta, cap. 1, and cap. 3, and the perambulations and grants thereupon"; 4th Instit. 303. As to rights of common in

respect of purliew, see *Rex v. Inhabitants of Rodley*, Hardr. 437; *Jenning v. Roche*, Palm. 93.

Purpresture or **Pourpresture**, is properly when there is a house builded or an enclosure made of any part of the king's demesnes or of a highway, or of a common street or public water, or such like public things; Co. Litt. 277 b; but it may be used of inclosures made against a subject; 2nd Instit. 272; Spelm. Gloss. s. v. *Purprestura*. The cases as to obstruction of Highways will be found collected in 7 Fisher, Dig. p. 656 *et seq.*

Quadrantata terræ.—See *ante*, MEASURES OF LAND.

Quarentena terræ.—A furlong; Co. Litt. 5 b; Spelm. Gloss. *sub voc.* It is also used in the secondary meaning of a furlong or shot (a division in the common field); Seebohm, Eng. Vill. Comm. p. 4; and for that reason, we suppose, "some hold that by that name land may be demanded;" Co. Litt. 5 b. See *ante*, MEASURES OF LAND.

Rectory.—Rectory is taken to mean "integra ecclesia parochialis cum omnibus suis juribus, prædiis, decimis, aliisque proventuum speciebus: alias vulgo dictum beneficium;" or it is taken "pro mansione seu domicilio Rectoris, quæ in Rectoria suâ instar capitis vel aulæ est;" Spelm. Gloss. s. v. *Rectoria*.

"The term Rectory is not confined to one parish;" per Burrough, J., *Howman & Others*, 8 Taunt. 688.

"The word rectory comprehends the parish church, with all its rights, glebes, tithes, and other profits whatsoever;" 5 Cruise, Dig. Tit. 85, Ch. 6, s. 14, p. 134.

As to the distinction between a rector and a vicar at the present day, see Cripps on the Law of the Church, p. 160.

Rents are divided into rent service, rent charge, and rent seck; see these explained Co. Litt. 141 b, *et seq.*; 2 Bl. Comm. 41, *et seq.* A power of distress was conferred by 4 Geo. 2, c. 28, s. 5, on the owner of a rent seck. Rent reserved on a

lease for years and incident to the reversion (see as to leases after 1881, the C.A., 1881, s. 10) is rent service; see Co. Litt. 142 b, 148 a.

Rents are also divided into :—

(1) *Redditus assisus*, or *redditus assisæ*, rents of assise; i.e., the certain rents of the freeholders and ancient copyholders, because they be assised and certain, and doth distinguish the same from *redditus mobiles*, farm rents for life, years, or at will, which are variable and uncertain. (2) *Redditus albi*, white rents, blanch farmes, or rents vulgarly and commonly called quit rents; they are called white rents because they were paid in silver, to distinguish them from work days (see *ante*, *PRECARIÆ*), rent cummin, rent corn, &c. And again, these are called (3) *redditus nigri*, black mail, that is, black rents, to distinguish them from white rents. (4) *Redditus resoluti* be rents issuing out of the manors, &c., to other lords; 2nd Inst. 19.

Fee farm, properly taken, is when the lord upon the creation of the tenancy reserve to himself and his heirs, either the rent for which it was before letten to farm, or at least a fourth part of that farm rent. But Britton saith '*fee fermes sont terres tenus en fee a rendre pur eux par an la verreye value, ou plus, ou meyns*;' and is called a fee farm because a farm rent is reserved upon a grant in fee. And regularly, as it appeareth by this Act (Magna Charta, c. 27) lands granted in fee farm are holden in socage, unless an express tenure by knight's service be reserved; 2nd Inst. 44. See Spelm. Gloss. s. v. *Feodifirma*.

Rents of Assize payable by freeholders (2 Bl. Com. 43) and rent-charges are popularly called chief rents.

Rack rent is rent of or approaching to the full annual value of the property out of which it issues.

Fluctuating
rent.

A rent may fluctuate in amount according to events; *Ex p. Voisey*, 21 Ch. D. 442.

A rent cannot be granted out of an incorporeal hereditament; Co. Litt. 144a; except a reversion or remainder; Co. Litt. 47a, unless it be granted to the King, or to a subject by Statute; Chitty, Prerog. 209; Burton, Comp. s. 1051.

As to the proper method of creating a rent *de novo* to be the

subject of a strict settlement, see *Fearne*, C. R. 529, note xii.; Co. Litt. 298a, and Butl. note (2).

The grantee in tail of a rent *de novo*, without a subsequent limitation of it in fee, acquires by a disentailing assurance, only a base fee determinable on his death without issue; but if there is a limitation of it in fee after the limitation in tail he acquires a fee simple; *Smith v. Farnaby*, Cart. 52; S. C., Sid. 285; 2 Keb. 29, 55, 84; 1 Lev. 144; *Weekes v. Peach*, Nels. Lutw. 384; S. C., Salk. 577; *Chaplin v. Chaplin*, 3 P. Wms. 229; S. C., 2 Eq. Ca. Ab. 384, 385.

Rent granted out of gavelkind or Borough English land is of the same nature; *per Fitzh.* 14 H. 8, 7 B. (Query, does not this mean rent service, not rent-charge?)

See further as to rents, *Burton*, Comp. ch. 6, s. 2; 1250 *et seq.*

Rents and Profits.—By the conveyance of the rents and profits of land the land itself passes. See *ante*, HERBAGE.

“If a man seised of lands in fee by his deed granteth to another the profit of those lands, to have and to hold to him and his heirs, and maketh livery secundum formam chartæ, the whole land itself doth pass: for what is land but the profits thereof: for thereby vesture, herbage, trees, mines, and all whatsoever parcel of that land doth pass;” Co. Litt. 4 b; *Shep. Touch.* 97. See also 14 H. 8, 6 b, where it is stated that by the grant of the profits of land, or *vestura terræ*, the land itself passes. The rule appears to be founded on the old feudal law: *per Lord Cranworth*, L.J., *Blann v. Bell*, 2 De G. M. & G. 781.

But by the grant of rent incident to a reversion the reversion does not pass; Co. Litt. 151 b, 152 a.

As to charges on rents and profits, see *ante*, p. 379; and as to charges on *annual* rents and profits, see *ante*, p. 380 *et seq.*

Apparently a lease of “the profits of a wood” does not authorise the lessee to cut the trees, but only to take the profits, as pannage, herbage, &c.; 4 Leon. 8, pl. 37.

Ridge.—A selio; Co. Litt. 5 b; see *ante*, COMMON FIELDS.

Selda.—A Salt pit; Co. Litt. 4 b. A window; *Spelm.*

Gloss. *sub voc.*; but is it not rather a stall in a market or shop?

Selion.—By the grant of a selion of land the land passes. Co. Litt. 5 b; Spelm. Gloss. *sub voc.* See *ante*, COMMON FIELDS and MEASURES OF LAND.

"Selliones" occur as parcels of land in Reg. Worcester Priory (Camd. Soc.), fol. 47 a, 49 a, 56 b. See Elton, Tenures of Kent, "Sulyng," &c.

Sheepheaves.—"Small plots of pasture often in the middle of a waste . . . the soil of which may or may not be in the lord, but the pasture is certainly a private property, and is leased and sold as such;" Cooke, Inclos. Acts, 44.

Soke.—A manor or Lordship; Spelm. Gloss. s. v. *Soca*. See an example in *Beauchamp v. Winn*, L. R. 6 H. L. at p. 243.

Solidata terræ.—Twelve acres. See *ante*, MEASURES OF LAND.

Solinus.—Probably = 180 acres, or two hides of 90 acres each. See Domesd. of St. Paul's (Camd. Soc.), Introd. p. xiv., where it is said to be apparently the same as the Kentish *Sulyng*, as to which see Elton, Tenures of Kent.

Sollar.—The lower part of a house—a room; Spelm. Gloss. s. v. *Solarium*.

Stallage and Pickage.—See MARKET. Stallage is the right of putting up a stall in a fair or market, and also the money paid to the owner of the soil for so doing; pickage is the right of picking up the soil for that purpose, and the money paid to the owner of the soil for so doing; Spelm. Gloss. s. v. *Stallagium*: *Rex v. Maydenhead*, Palmer, 76; S. C., 2 Rol. Rep. 155. See this discussed in *The Mayor of Yarmouth v. Groom*, 1 H. & C. 102.

These rights are incident to the soil, so that if the King grant a market with certain toll to A. and his heirs, to be held in Borough English land, the heir at Common Law has the

market and tolls, while the heir at Borough English has the stallage and pickage : *Heddy v. Wellhouse*, Moore, 474.

Stallage and pickage may be claimed by grant or prescription : see the cases cited in *The King v. Maidenhead*, 2 Rol. Rep. 155 ; S. C., Palm. 76 ; or by custom by the inhabitants of a borough (? Vill) : *Elwood v. Bullock*, 6 Q. B. 383, by victuallers coming to a fair holden at fixed times of the year in some part of the commons and wastes of a manor to be named by the Lord : *Tyson v. Smith*, 6 A. & E. 745, on app. 9 A. & E. 406.

Stallage may pass under the word toll : *Bennington v. Taylor*, Lutw. 488 ; *Hickman's Case*, 2 Rol. Ab. 123.

Stiche.—A selio ; Spelm. Gloss. s. v. *Selio*. See *ante*, COMMON FIELDS ; SELION.

Stint or Stinted Pasture.—See *ante*, PASTURE.

Stray.—See ESTRAY.

Tenement “is a large word to pass not only lands and other inheritances which are holden, but also offices, rents, commons, profits apprender out of lands, and the like, wherein a man hath any frank tenement, and whereof he is seised *ut de libero tenemento*. But *hereditamentum*, hereditament, is the largest word of all in that kind :” Co. Litt. 6 a.

“*Tenements*. This is the only word which the statute of W. 2, that created estates tail, useth : and it includeth not only all corporate inheritances, which are or may be holden, but also all inheritances issuing out of any of those inheritances, or concerning or annexed to or exercisable within the same, though they lie not in tenure ; therefore all these without question may be entailed. As rents, estovers, commons, or other profits whatsoever granted out of land ; or uses, offices, dignities, which concern lands or certain places, may be entailed within the said statute, because all these savour of the realty ;” Co. Litt. 19 b.

See as to the effect of creating a title of honour without reference to a place, *Creation of Baronets*, 12 Rep. 81 ; *Nevil's Case*, 7 Rep. 33 a ; Co. Litt. 20 a, note (3).

Tenement "doth not comprehend a personal annuity in fee, and an annuity for life is neither a tenement or hereditament; and an office for life is a tenement, and not a hereditament;" Shep. Touch. 91.

Tenement, within 8 Hen. 6, c. 7, includes a rentcharge granted by deed without power of distress: *Dodds v. Thompson*, L. R. 1 C. P. 138.

See as to the meaning of "tenement," *Yorkshire Insurance Co. v. Clayton*, 8 Q. B. D. 421 (*per* Jessel, M.R., at p. 423), where it was held that the word in an Act of Parliament meant "what is in law a house, though it is in fact part of a house."

"I do not conceive that any running power could be the subject of tenure:" *per* Jessel, M.R., *Great Western Rail. Co. v. Swindon, &c., Rail. Co.*, 22 Ch. Div. 677, at p. 697.

"That is to say" is the commencement of an ancillary clause which explains the meaning of the principal clause. It has the following properties:—(1) it must not be contrary to the principal clause; (2) it must neither increase nor diminish it; (3) but where the principal clause is general in terms, it may restrict it: see this explained, with many examples, *Stukely v. Butler*, Hob. 171; and see an example, *Harrington v. Pole*, Dy. 77 b, pl. 38.

Toft, is the place where a house has been, but now there is none, and the site of the house can be seen, and by this name it will pass in a grant; 21 Ed. 4, 52, Pl. 15; Shep. Touch. 95. Spelman says that the house must have been in the country; see Gloss. s. v. *Toftmannus*. As to whether common of pasture can belong to a toft, see *Abbot of — v. Benteleye*, 35 Ed. 1, 495, Rec. Pub. (r).

Toll to the Fair or Market, "is a reasonable sum of money due to the owner of the fair or market upon sale of

(r) The Rec. Ed. translates "licet tofti fuerat terra"—"although the tofts were land;" sed qu. translate "although there had been land of the toft," i.e., arable land held with it, or, "although the tofts had formerly been arable land." Qu. read *fuerat*, i.e., *fuerant*.

things tollable within the fair or market, or to the owner of the soil for stallage, piccage, or the like;" 2nd Instit. 220; see *ante*, STALLAGE. The owner of the fair or market has no right to toll unless under the king's grant, or by prescription; and if the toll be unreasonable, the grant will be void; 2nd Instit. 220; *Heddy v. Wheelhouse*, Cro. El. 558. See more about tolls, *Jehu Webb's Case*, 8 Rep. 46 b; Spelm. Gloss. s. v. *Toll*; *Running on Tolls*. The grant of a market or fair "*cum omnibus libertatibus et liberis consuetudinibus ad hujusmodi mercatum et feriam pertinentibus*" does not give a right to take toll; *Egremont v. Saul*, 6 Ad. & El. 924; *Osbuston v. James*, Lutw. 442; *The King v. Maidenhead*, 2 Rol. Rep. 155; *Holloway v. Smith*, Stra. 1171. All the cases are discussed in *Stamford v. Pawlett*, 1 Cr. & Jerv. 57.

On the other hand, "if a man has a fair or market by grant or prescription, whereto toll hath been usually paid, which afterwards is forfeited to the king, and the king then grants it *cum omnibus libertatibus ad hujusmodi feriam spectantibus*; by this grant the grantee shall have toll, for toll was formerly belonging thereto;" *Heddy v. Wheelhouse*, Cro. El. at p. 592. See *ante*, FRANCHISES.

Toll Traverse and **Thorough Toll**, are often confounded. *Thorough toll* is where toll is taken of men for passing through a vill in the high street; or over a bridge; *Heshord v. Wills*, 1 Sid. 454; or a navigable river; *Mayor, &c., of Nottingham v. Lambert*, Willes, 111. *Toll traverse* is where a man pays certain toll for passing over the soil of another man in a way not a high street; 22 Lib. Ass. pl. 58; and both sorts of toll may be claimed in respect of animals.

It appears very doubtful whether *Toll thorough* can be claimed by prescription, unless the person claiming is bound to repair the road; *Smith v. Shepherd*, Cro. El. 710; S. C., differently reported, Moor. 574; *Truman v. Walsham*, 2 Wils. 296; *Rex v. Corporation of Boston*, W. Jo. 162. See also *Warington v. Mosely*, Comb. 295. And the duty of repairing some of the streets of a town is not sufficient consideration to support a claim of toll thorough, through all the streets of the town; *Brett v. Beales*, 10 B. & C. 508.

Toll traverse can be claimed by prescription of a person passing over a public highway, if it can be shown that the rights of passing over the soil and of taking the toll are both immemorial, and that the soil and the tolls were before the time of legal memory in the same hands; *Pelham v. Pickersgill*, 1 T. R. 660; also a lawful origin for the toll may be presumed within the time of legal memory by means of a dedication of the road to the public, and a contemporaneous reservation of toll; *Lawrence v. Hitch*, L. R. 3 Q. B. 521.

Toll thorough and Toll traverse can be appurtenant to a manor; *James v. Johnson*, 2 Mod. 143.

See Gunning on Tolls.

Township: Vill.—(See *ante*, p. 168, note, as to the distinction between vill and parish). The reader is referred to Stubbs' *Constit. Hist.* for a discussion of the modern theories as to the meaning of Township. Mr. Seebohm (*Eng. Vill. Comm.* pp. 126, 254), following Spelman (*Gloss. s. v. Villa*) and Fitzherbert on Surveying, considers a vill and a manor to have been originally the same; see Ellis, *Introd. Domesd.*, vol. 1, p. 240, cited *ante*, s. v. MANOR. See also Co. Litt. 115 b; Williams on Commons, *passim*; Digby, *Hist. Real P.* 3rd ed. 43, *et seq.*; Maine, *Village Communities*, Lectures III. and V., and *Early Law and Custom*, cited *ante*, MANOR; and some remarks in Wms. on Real P., Appendix C.; Palgrave, *Eng. Commonwealth*, Vol. I., p. 65.

"This word 'village' or 'town' is of large extent, and by a grant of it a manor (Co. Litt. 5 a), land, meadow, and pasture, and divers such like things may pass;" Shep. Touch. 92 a. "And by the name of a manor, divers towns may pass;" Co. Litt. 5 a; see 58 a. Madox says (*Firma Burgi*, ch. 1, sect. 5, pp. 4, 14), "From the time of the Norman Conquest downwards, the cities and towns of England were vested either in the Crown, or else in the clergy; or in the baronage or great men of the layety. That is to say, the King was immediate lord of some towns, and particular persons, either of the clergy or layety, were immediate lords of other towns. . . . When the King was seised of a city or town in demearre, he had a compleat seisin of it with all its parts and

adjuncts. He was lord of the soil, to wit, of all the land within the site and precinct of the town . . . the herbage and productions of the earth. . . . But sometimes the Crown thought fit to grant some part of a city or town, or some profit or appurtenant thereof, to a private man or to a religious house. By which means it sometimes came to pass that the property of a city or town was divided (s) into a half, a third, or other part or parts."

The division of the kingdom into counties, hundreds, and tithings, towns or vills, and the nature of the latter, are explained by Blackstone (Comm. vol. i. pp. 113, 114).

Fortescue (de Laud. c. 24, temp. Hen. VI.) says that Hundreds are divided into *villae*, which include boroughs and cities; and he adds, "*Villarum metæ non muris ædificiis aut stratis terminantur, sed agrorum ambitibus, territoriis magnis, hamiletis quibusdam et multis aliis, sicut aquarum boscorum et vastorum terminis*" (a passage which points to the waste or common of the vill).

See also Bracton, lib. iv. c. 31, fol. 211; *ib.*, lib. v. c. 27, fol. 434 (Rolls Series, ed. Twiss, vol. iii. p. 394; vol. vi. p. 428). In the former passage, Bracton distinguishes between a "mansio" and a "villa," and says that a villa must consist of more than one "ædificium." He also observes (fol. 212) that a manor (*manerium*) may comprise several adjoining buildings, or vills and hamlets adjacent. "Poterit enim esse manerium et per se, et cum pluribus villis, et cum

(s) The "lord of the vill" is frequently mentioned in the Year Books. See Williams on Commons, p. 50, and add to the references there given, Y. B. 22 Ed. I. 589, Rec. Pub., 30 Ed. I. 17, Rec. Pub., 32 Ed. I. 23, Rec. Pub., *Fitz-Alan v. Roger*, 32 Ed. I. 271, Rec. Pub., *Abbot of — v. Bentley*, 35 Ed. I. 495, Rec. Pub. In many cases there were two or more lords. See e.g., *Multatent v. Rompley*, 32 Ed. I. 227, Rec. Pub., *Elderley v. Mauvoissant*, 32 Ed. I. 505, Rec. Pub., 33 Ed. I. 220, Rec. Pub., Bract, 229, *et seq.* An example of this will be found in the Hundred Rolls (Vol. 2, p. 253, Rec. Ed.) in the case of the vill of Little Shelford, cited *ante*, p. 611. So Seaford (apparently the vill of Seaford) contained four manors, 7 Sussex Archaeol. 121; and in the vill of Darsham there were at Domesday six lordships, which afterwards became consolidated into the four manors existing there at the present day: Suckling's Hist. Suffolk, Vol. 2, p. 220.

Query, whether in cases where there are several manors in the same vill, the freehold of the soil of the waste is in the Crown; or the lords are tenants in common of the waste, as in *Lord Berkeley's Case*, Sav. 61, pl. 132.

pluribus hamlettis adjacentibus, quorum nullum dici poterit manerium per se, sed villae [qu. villa] sive hamletta. Poterit etiam esse per se manerium capitale et plura continere sub se maneria non capitalia et plures villas et plures hamlettas quasi sub uno capite et dominio uno."

In the latter passage (fol. 434 a), Bracton distinguishes "mansio," "villa," and "manerium." He says a "mansio" may consist of one house or of several; but if of one only, it will not be a vill, for a vill is made up of several mansiones (Co. Litt. 115 b; adopts this); and a manor may comprise several vills (Co. Litt. 125 b), or one only. Several tenements may pertain to a mansio. Likewise, sometimes a manor is in a vill [qu. i.e., the vill is more extensive than the manor]; and where there is only one villa in a manor, the same name may be applied to both, and tenements may be described as lying in the manor of A., or the vill of A., indifferently, because the name of the vill is the name of the manor, and *e contrario*. [This appears to be the meaning of the passage]. He goes on to say that there cannot be several manors in one vill; for the manor contains the vill but not *e converso*. But Britton, liv. ii. c. 19, fol. 129 b (vol. i. p. 333, ed. Nichols), says, "En une vile porrount estre plusours paroches et en une paroche plusours maners, et hamlets plusours porrount apendre a un maner." Croke, C. J., speaks of two manors in one town; *Whittier v. Stockman*, 2 Bulst. at p. 87.

Fleta, lib. i., c. 24, refers to "campestres villae," as distinguished from "burgi;" and in lib. 4, c. 15, s. 9, to the relation between manors, vills, hamlets, and parishes. And see Fleta, lib. vi., c. 51, s. 1.

The meaning of "village" was much discussed in *Waterpark v. Fennell*, 7 H. L. C. 650; and see *Anon.*, 12 Mod. pl. 912; *R. v. Showler*, 3 Burr. 1391; *R. v. Horton*, 1 T. R. 374.

"Every borough is a town, but not *e converso*;" Litt. s. 171. Sometimes *denu* or *denna* signifieth, as *villa* and *denne*, a town; Co. Litt. 4 b.

A list of all the townships will be found in Spelman's "Villare Anglicum."

Trees.—See Hall on Profits à Prendre, 33, 101; Craig on

Trees and Woods. As to the right to windfalls as between executor and heir or devisee, see *Re Ainslie*, 28 Ch. D. 89; and as between tenant for life and remainderman, see *Re Harrison's Trusts*, 28 Ch. D. 220.

Turbary.—Common of Turbary is a right to dig turves (*i.e.*, peat, not green turf) in another man's land, or in the lord's waste, for fuel to burn in the house; and therefore it is appendant or appurtenant to a house only and not to land; 5 Assis. 9; *Tyrringham's Case*, 4 Rep. at 36 b; S. C., Tudor, L. C. R. P.; *O'Hare v. Foley*, 10 Ir. C. L. Rep. 318. It cannot be dug for sale; *Valentine v. Penny*, Noy, 145; *Hayward v. Cannington*, 1 Sid. 354; S. C., 1 Lev. 232; 2 Keb. 290, 311. And it does not give a right to take green turf for making grass plots, or repairing the hedges or fences of a garden; *Wilson v. Willes*, 7 East, 121; Williams on Comm. 187. Common of Turbary appurtenant to a house passes by a grant of the house with the appurtenances; *Solme v. Bullock*, 3 Lev. 165 (*t*).

Seemle, the lord cannot approve against common of turbary, either at common law or under the Statute of Merton; Wms. on Comm. 137; *Nicholls v. Mitford*, 20 Ch. D. 380; unless there is a custom to do so; *Arlett v. Ellis*, 7 B. & C. 346; *Lascelles v. Lord Onslow*, 2 Q. B. D. 433; Digby, Hist. Real P., p. 157, citing Coke, 2nd Instit. 87.

See Spelman, Gloss. s. v. *Turba*; Williams on Commons, *passim*.

The right to dig and pare turf was distinguished in 32 Ed. 1., 40 (Rolls Series, Y. B.).

Utland.—Tenemental land; Spelm. Gloss. s. v. *Inland*.

Velindre.—Welsh for vill; 4 T. R. 552, note (*b*).

Vert, “**Viridis**, or **Green** hue, *a viriditate*. The French calleth it verd, we vert, whatsoever beareth green leaf, but specially of great and thick coverts. And vert is of divers kinds, some that beareth fruit that may serve as well for food of men as of beasts, as pear trees, chestnut trees, apple trees,

(t) See as to conveyances after 1881, the C. A. 1881, s. 6. •
s s 2•

service trees, nut trees, crab trees, and for the shelter and defence of the same : some called haut-boys, serving for food and browse of and for the game, and for the defence of them, as oaks, beeches, &c. Some haut-boys, for browse and shelter and defence only, as ashes, poples, &c. Of sub-boys, some for browse and food of the game, and for shelter and defence, as maples, &c. ; some for browse and defence, as birch, sallow, willow, &c. ; some for shelter and defence only, as alder, elder, &c. Of bushes and other vegetables, some for food and shelter, as the hawthorn, blackthorn, &c. ; some for hiding and shelter, as brakes, gorse, heath, &c. To sum up all, *plantarum tria sunt genera: arbores, arborescentes, and herbæ.* *Arbores*, as haut-boys and sub-boys; *arborescentes*, as bushes, brakes, &c. ; *herbæ*, as herbs and weeds, which, albeit they be green, yet our legall viridis extendeth not to them ;" 4th Instit. 317.

See also Spelm. Gloss. s. vv. *Verd, Viride*, where it is said that vert is used in two meanings : (1) for the right of cutting firewood in a forest granted by the king ; (2) for the right of depasturing animals in the forest. Spelman gives an instance of a grant "*tam de viridi quam de sicco.*"

And see *per* Bacon, V.-C., *Earl de la Warr v. Miles*, 17 Ch. D. at p. 570.

Vill.—See TOWNSHIP.

Virgate or Yardland.—See *ante*, COMMON FIELDS, and MEASURES OF LAND.

Vivarium is a word of large extent, and *ex vi termini* signifieth a place in land or water where living things be kept. Most commonly in law it signifieth parks, warrens, and piscaries, or fishings ; 2nd Inst. 100 ; or a stew ; 2nd Inst. 162. See Spelm. Gloss. *sub. voc.*

Viver or Vivier.—A fishpond ; 2nd Inst. 199.

Warectum, Wareccum, or Varectum "doth signify fallow ;" Co. Litt. 5b. "*Terra neglecta vel diu inculta ;*" Spelm. Gloss. *sub. voc.*

Warren or Free Warren is a franchise to have and keep certain wild beasts and fowls called game within the precincts of a manor or other known place; Williams on Commons, 238, where the form of grant of free warren by the Crown is given. See also Spelm. Gloss. s. v. *Wareuna*. See the cases as to the creation of warrens collected in 2 Bro. Ab. *Warren*, and 2 Roll. Ab. *Warren*.

Though a warren may by prescription appertain to a manor, yet where the lord of a manor has also a warren in gross in the same manor, the warren does not pass by a feoffment of the manor; Dy. 30b, pl. 209; nor by a grant of the manor "with all warrens, &c., thereto appertaining or accepted or reputed as part of the manor;" *Bowlston v. Hardy*, Cro. El. 547. See also *Morris v. Dimes*, 1 Ad. & El. 654. On the other hand, where the owner of the manor has warren in another man's land appurtenant to his manor, it passes by a conveyance of the manor with the appurtenances; but not by a grant of the manor alone; *Stile v. Tewkesbury*, 8 Hen. 7, 4 B. See other cases as to when a warren passes, Vin. Abr. s. v. *Warren*.

Although the word "warren" is, strictly speaking, appropriated to the franchise, it is sometimes used in the secondary sense of the land over which that franchise is exerciseable. The principal authorities for construing the word "warren" to mean the land are Co. Litt. 5b, and the dicta of Coke in *Rice v. Wiseman*, 3 Buls. 82; S. C. 1 Rol. Rep. 259; in both which places Coke seems to have thought that a conveyance of a warren in a man's own land would necessarily pass the land; but these authorities are said by Lord Chelmsford, in *Earl Beauchamp v. Winn*, L. R. 6 H. L. 238, on app. from L. R. 4 Ch. 562, not to be very convincing.

In *Earl Beauchamp v. Winn*, the words "warren of conies" were held not to pass the land; while in *Robinson v. Duleep Singh*, 11 Ch. D. 798, the words "all that warren of conies in L.," were, under the circumstances, held to pass the land.

As to what are beasts and birds of the warren, see Co. Litt. 238a; *Dorsetshire v. Lodge*, 7 B. & C. 36.

Water.—If a man grant *aquam suam*, the soil shall not

pass, but the pischary within the water passeth therewith; and land covered with water shall be demanded by the name of so many acres *aquâ co-opertas*; Co. Litt. 4b; *Challenor v. Thomas*, Yelv. 148; S. C. 1 Brownl. 142.

Way.—"There be three kinde of wayes, whereof you shall reade in our ancient bookes. First, a foot-way, which is called iter, *quod est jus cundi vel ambulandi hominis*; and this was the first way.

"The second is a foot way and horse way, which is called *actus, ab agendo*; and this vulgarly is called packe and prime way, because it is both a foot way, which was the first or prime way, and a packe or drift way also.

"The third is *via* or *aditus*, which contains the other two, and also a cart way, &c., for this is *jus cundi vehendi, et vehiculum et jumentum ducendi*: and this is twofold, viz., *regia via*, the king's highway for all men, *et communis strata*, belonging to a city or towne, or betweene neighbours and neighbours. This is called in our bookes *chimen*, being a French word for a way, whereof commeth *chiminage, chiminagium, or chimmagium*, which signifieth a toll due by custome for having a way through a forest; and in ancient records it is some time also called *pedagium*;" Co. Litt. 56a.

There is another kind of way not included in the above division, viz., a drift way or way for driving cattle, which is not necessarily included in a carriage or horse way; *Ballard v. Dyson*, 1 Taunt. 279.

A right of way of either nature may exist for certain purposes only; *Cowling v. Higginson*, 4 M. & W. 245; *Brunton v. Hall*, 1 Q. B. 792; *Wimbledon, &c. v. Dixon*, 1 Ch. D. 362; *Bradburne v. Morris*, 3 Ch. D. 812.

A right of way may be created by a covenant by the owner of the servient tenement that the owner of the dominant tenement shall enjoy it; *Holmes v. Sellar*, 3 Lev. 305. As to when a right of way passes by the conveyance of the dominant tenement, see *ante*, Chap. XIII., p. 186, *et seq.*

Wike.—A farm. Co. Litt. 5a.

Wista.—Half a hide. Great wista, a hide; Seebohm, Eng.

Vill. Comm.^o 51 ; Spelm. Gloss. *sub voc.*, where it is said that wista is sometimes used for virgate.

Wood : Boscus : contains timber or hautboys and underwood or subboscus ; see *anté*, VERD. Both the trees and the soil on which they stand pass by the grant of a wood or boscus ; Co. Litt. 4b. In like manner, by an exception in a lease of the woods and underwoods growing or being on the property demised, the soil itself on which they grow is excepted ; *Ire's Case*, 5 Rep. 11a ; *Hide v. Whistler*, Pop. 146 ; *Whistler v. Paston*, Cro. Jac. 487. On the other hand, by an exception of "trees" (*Liford's Case*, 11 Rep. 46b), "saleable underwoods" now growing on the premises (*Pincombe v. Thomas*, Cro. Jac. 524), the soil itself is not excepted. See *Glover v. Andrew*, 1 And. 7. See this discussed in 14 Hen. 8, 1, pl. 1 ; *Cuge and Paxlin's Case*, 1 Leon. 116. See on all the above cases Dy. 19a, pl. 110, and the cases there cited. See *ante*, TREES.

Yardland.—Land may pass by the name of a yardland ; Co. Litt. 5a. As to the meaning of yardland, see *ante*, COMMON, FIELDS ; MEASURES OF LAND ; Spelm. Gloss. s. v. *Virgate*. Nasse, Agric. Comm. (trans. Ouvry), p. 9 ; Williams, R. P., App. C.

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